Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Petitioner,

vs.

GERRISH CORPORATION, doing business as Gerrish Motors, doing business as Scrub-a-Dub,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX, VOLUME I, PAGES 1-109

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QUESTIONS PRESENTED

I. Can a federal court disregard the notice and hearing provisions of a state insurance regulatory statute, where the statute would be constitutionally infirm without those provisions?

II. Where a state's insurance regulatory statutes require the state to give an insurer notice and an opportunity for hearing if the state intends to withdraw approval of a previously approved policy form, does a federal court order requiring an insurer to amend an insurance contract written on an approved form deprive the insurer of constitutional rights where the state has not notified the insurer that approval of the policy form is withdrawn?

III. Where a federal court finds that an insurance contract unambiguously excludes pollution coverage, can the court nevertheless constitutionally compel the insurer to provide pollution coverage, in the absence of a statute, rule or regulation requiring such coverage?

IV. Can a federal court constitutionally compel an insurer to provide insurance coverage where the state with administrative jurisdiction in the matter would be estopped to require such coverage?

V. Are government mandated environmental response costs "damages" for which coverage is provided under standard general liability insurance policy language?

PARTIES TO THE PROCEEDING

UNIVERSAL UNDERWRITERS INSURANCE COMPANY[1]

Petitioner,

vs.

GERRISH CORPORATION, doing business as Gerrish Motors, doing business as Scrub-a-Dub

Respondent.

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[1] Universal Underwriters is a wholly-owned subsidiary of Maryland Casualty Company, which is a wholly-owned subsidiary of Zurich Insurance Company – U.S. Branch, which in turn is owned by Zurich Insurance Company, Zurich, Switzerland. In addition to several wholly-owned subsidiaries, Universal Underwriters owns a controlling interest in Zurich American Life Insurance Company.

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It is undisputed that VDBI neither adopted a rule on pollution exclusions nor gave notice of its intent to withdraw prior approval of the Unicover III policy containing pollution exclusions. VDBI would, under the circumstances, be estopped to claim that coverage existed. 20

Vermont's Supreme Court has consistently held that where statutory notice of intent to withdraw approval of a license or permit is mandated, generalized rulemaking or a change in agency position is not sufficient to amend the license. Vermont law also holds that an administrative agency cannot exceed its delegated authority. 24

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**Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

PETITION FOR WRIT OF CERTIORARI

Universal Underwriters Insurance Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 947 F.2d 1023. The opinion of the United States District Court for the District of Vermont (App. 20)

is reported at 754 F.Supp. 358. The order of the Court of Appeals (App. 57) denying petitioner's motion for reargument is not reported.

JURISDICTION

The opinion of the United States Court of Appeals was entered on October 30, 1991. A timely motion for reargument was denied on November 29, 1991 (App. 57). On February 20, 1992, this Court granted an extension of time within which to file a petition for writ of certiorari until March 29, 1992 (App. 59). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are set out verbatim in the Appendix:

United States Constitution,

Article I, Section 10;

Amendment V;

Amendment XIV

Vermont Statutes Annotated, Title 3

Sections 801, 814, 831, 832, 835-848

Vermont Statutes Annotated, Title 8

Sections 3541, 3542, 4201-4210

STATEMENT OF THE CASE

Universal Underwriters Insurance Company ("Universal") is a stock insurance company with its principal place of business in Kansas City, Kansas. Universal, which specializes in insuring automobile, truck and motorcycle dealers, does business in nearly every state. It staffs a Governmental Affairs Department, which is responsible for compliance with all of the nuances of the insurance regulatory requirements in the many states in which it does business. In Vermont, as elsewhere, Universal files with the Department of Banking and Insurance ("VDBI") forms of insurance policies and manuals of the rules and rates it intends to apply to those policy forms when writing coverage in Vermont. By statute, a liability insurance policy form cannot be used in Vermont unless the carrier has received prior approval of that form from VDBI, 8 V.S.A. §3541. (App. 87). Title 8 V.S.A. §§4201-4204 (App. 90) contains similar provisions specifically applicable to liability insurance policies.

In May, 1980, Universal submitted to VDBI for approval, its "Unicover III" insurance policy form. Unicover III, like Unicover II which preceded it, is a policy form especially designed for use in insuring automobile dealer risks. The Unicover III policy form, which specifically excludes coverage for claims based upon contamination of a watercourse by a petroleum substance was approved by VDBI for Universal's use in Vermont on May 19, 1980. (App. 110). A Vermont endorsement (the "Vermont State Amendatory Part") which references the pollution exclusions contained in the policy was filed with and approved as mandatory for use with the Unicover III policy. (App. 122-26). Universal subsequently filed a

number of amendments to its Unicover III policy form; none of the amendments approved for Universal's use prior to May 6, 1985 changed the Unicover III exclusion concerning petroleum pollution of a watercourse. An amended Universal Vermont endorsement referencing the Unicover III pollution exclusions (which remained unchanged by the amendment) was again approved by VDBI on October 26, 1983. (App. 231).

Universal's Governmental Affairs Department carefully monitored filings made in Vermont and elsewhere by the Insurance Services Office ("ISO"), an insurance rating and services organization representing a large number of carriers nationwide. Universal frequently informed VDBI, in the cover letter accompanying its filings and amendments thereto, how its filing differed from or was similar to "common insurance language," or a form ISO had on file. (See, e.g., App. 115). When Universal filed the first edition of its Unicover III policy form in May, 1980, it pointed out to VDBI that the Unicover exclusion pertaining to the "discharge or escape of petroleum into a body of water" differed from "standard language." (App. 121).

By statute, 8 V.S.A. §3541(b), (c) (App. 87), VDBI would be required to give Universal notice and an opportunity for hearing if it intended to withdraw the approval it previously gave to the Unicover III policy form. The statute pertaining to filing and approval of liability insurance policy forms provides, in pertinent part:

> (b) . . . The commissioner may at any time, *after notice and for cause shown,* withdraw any such approval. In any notice of disapproval, or withdrawal of a previously approved form, the commissioner shall state that *a hearing will be*

> *granted* within twenty days upon request of the Insurer.
>
> (c) Any order of the commissioner disapproving any such form or withdrawing a previous approval shall state the grounds therefor and the particulars thereof in such detail as reasonably to inform the insurer thereof. . . .
>
> 8 V.S.A. §3541(b), (c) (emphasis added) (App. 87).

VDBI has never given Universal notice that it intends to withdraw approval of the Unicover III policy form.

Prior to and during the period of time when Universal had on file with VDBI its approved Unicover III policy form for automobile dealer risks, Universal, like many other carriers, maintained membership in ISO and had on file with VDBI a form authorizing ISO to file insurance policy rates and forms on its behalf. (The last ISO Authorization Form which Universal filed was dated October 1, 1982. (App. 266).)

The Vermont statute on filing and approval of policy forms provides that forms for use in casualty insurance may be filed by rating organizations on behalf of their members or subscribers, "but this provision shall not be deemed to prohibit any such member or subscriber from filing any such forms on its own behalf." 8 V.S.A. §3541(a) (App. 87). The ISO Authorization Form itself makes no suggestion that an insurer who signs it is thereafter precluded from filing separate, independent forms on its own behalf. Universal's Unicover III policy form contained a comprehensive general liability segment; some of the forms which ISO had on file with VDBI also contained general liability provisions. Universal filed its ISO Authorization Form with VDBI and the regulatory agencies of other states so that Universal could, if it chose,

write coverage on ISO forms in situations where its own specialized forms were not appropriate for the risk to be underwritten. In the overwhelming majority of cases Universal wrote coverage on its own forms and not on ISO's. Testimony from VDBI employees established that they could recognize the Unicover III policy on sight as being different from an ISO form, and that VDBI treated the Unicover III form as a filing separate from forms filed by ISO. (App. 366). VDBI consistently communicated directly with Universal, and not through ISO, about the Unicover III form in its files. Amendments and endorsements to the Unicover III policy were approved or disapproved on their own merit and not on the basis of whether ISO had approval for similar language. (See, e.g., App. 389-92; 403-04). In particular, a revised version of Universal's Vermont State Amendatory Part referencing the relevant pollution exclusions in the Unicover III policy was approved by VDBI on October 26, 1983, two weeks after VDBI informed ISO that ISO's general liability policy form could not contain pollution exclusions and one year after the last ISO Authorization Form was filed by Universal. (App. 231).

ISO's comprehensive general liability policy utilizes a different structure and different language from the Unicover III policy form. The ISO form also differed from Universal's in that, from some time prior to May, 1980 until January, 1983, the ISO comprehensive general liability form approved for use by ISO members in Vermont had a specific Vermont endorsement which deleted the pollution exclusion contained in the ISO policy.[2] Until

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[2] ISO, like Universal, files policy forms nationwide. Both ISO and Universal will submit a standard policy form to each

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January 1983, then, the approved ISO general liability form, unlike the Unicover III policy form, provided pollution coverage. In January, 1983, after ISO had assured VDBI that pollution coverage would be made available on a separate policy form, VDBI approved an amended ISO general liability policy form which excluded coverage for environmental pollution. In early October, 1983, however, VDBI informed ISO that if pollution coverage was not restored to ISO's general liability policy form, VDBI would withdraw its approval of that policy form. After some months of drafting and discussion with VDBI, ISO filed a Vermont endorsement which once again provided pollution coverage (by deleting the pollution exclusions contained in ISO's generic general liability policy form). ISO's Vermont endorsement was approved by VDBI effective July 1, 1984. Like Universal's Vermont State Amendatory Part, ISO's Vermont endorsement was approved as "mandatory" for use with ISO's comprehensive general liability policy form in Vermont.[3] Mandatory, in this context, is something of a term of art, and means that the endorsement must be used each time coverage is

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state in which they are filing, but add to that form endorsements or amendments designed to accommodate the peculiarities of each state's laws and regulations. Universal's Unicover III policy, for example, had a Vermont State Amendatory Part which was used with a Unicover III policy each time Universal wrote coverage in Vermont. ISO had its own Vermont endorsements.

[3] ISO did not delete the pollution exclusions from some of its other forms, including its Business Owners' Liability form, until approximately one year later.

written on the policy form to which it belongs. The word "mandatory" is used to make a distinction between endorsements which form an integral part of an approved policy form and endorsements which are optional – i.e., approved for a carrier's use when requested by and appropriate to a given risk. Universal, like other ISO members, received notice from ISO that ISO's Vermont endorsement was mandatory – in other words, that a carrier writing coverage on ISO's policy form in Vermont should in every instance attach ISO's Vermont endorsement.

At no time between May, 1980 when the Unicover III policy was first approved and May 6, 1985, the date plaintiff first received notice from the State of Vermont concerning its potential responsibility for an environmental clean-up, did the Unicover III policy form provide pollution coverage. Moreover, VDBI did not at any time advise Universal that its policy had to contain pollution coverage, or give Universal notice, pursuant to 8 V.S.A. §3541(b) and (c), that VDBI's approval of the Unicover III policy was going to be withdrawn. Nor did VDBI advise Universal that signing an ISO Authorization Form would preclude Universal from filing other different forms on its own behalf.[4]

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[4] The ISO Authorization Form (App. 266) states on its face that ISO's agency is "deemed amended" to the extent that Universal makes any VDBI filing on its own behalf which is inconsistent with the ISO filing on file. Universal's Unicover III insurance program, first approved by VDBI on May 19, 1980, was inconsistent with ISO's general liability policy if for no other reason than the pollution exclusions contained in Universal's policy. VDBI regulations provide that:

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Employees of VDBI testified at trial that a departmental policy in effect from the mid-1970's to January 1, 1983, and again after October 11, 1983, required carriers writing insurance in Vermont to provide pollution coverage. No formal rule or regulation requiring pollution coverage was adopted, however, and the Unicover III policy containing pollution exclusions was nevertheless approved while such a departmental policy was supposedly in place. VDBI employees also testified that their informal policy requiring pollution coverage (which they simply agreed to among themselves) (App. 361-63) was never applicable to insurance contracts written for insureds at high risk of pollution claims, such as businesses like Gerrish's which had underground storage tanks on their premises. (App. 392-93). VDBI employees later adopted, again informally, a procedure whereby insurers could exclude pollution coverage in high risk cases with the express consent of VDBI and acknowledgement of the insured. Universal eventually obtained

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> An insurer who has authorized a rating organization to submit . . . policy and/or form filings on its behalf may submit exceptions to that filing authorization. . . . The insurer may not use the insurance . . . policy or form which was filed by the rating organization in its behalf, on and after the effective date of its exception filing. Consequently, all subsequent revisions to the excepted rule, rate(s), etc., which are submitted by the rating organization, *will not apply* on behalf of such an insurer.
>
> Such an exception filing applies indefinitely . . . or until it is replaced or withdrawn.
>
> Reg. 81-3, Sec. VIII (emphasis added) (App. 313-14).

blanket advance consent of VDBI (so long as each individual insured acknowledged the pollution exclusions in writing), because virtually all of Universal's automobile dealer insureds, including Gerrish, fall in the high pollution risk category. (App. 367; 392-93).

Universal issued a renewal insurance policy for Gerrish, effective September 1, 1984 through September 1, 1985, on its Unicover III policy form, as that form had been approved, word-for-word, by VDBI. The renewal policy thus took effect two months after the effective date that pollution coverage was reincorporated into ISO's generic general liability policy form.

On May 6, 1985, Gerrish received notice from the Vermont Agency of Environmental Conservation that a petroleum product migrating from Gerrish's property was polluting the Ottauquechee River, a Vermont watercourse. Gerrish's attorneys sought coverage from Universal under the comprehensive general liability provisions of Gerrish's Unicover III policy. Universal referred Gerrish to the pollution exclusions in the policy, and undertook to monitor and manage environmental damage to the site only under a reservation of rights agreement. Gerrish then filed the instant declaratory judgment action in the United States District Court for the District of Vermont.

Gerrish's complaint sought a declaration that Universal was obligated to defend and indemnify Gerrish against costs it might incur in responding to the State's May 2, 1985 letter. Gerrish's complaint sought to avoid the effect of the pollution exclusions in his insurance policy on the grounds that VDBI did not permit pollution

exclusions in general liability insurance policies written in Vermont and, therefore, the policy issued to Gerrish had to be amended to conform to departmental policy. Complaint, ¶30 (App. 106).

Universal defended on the grounds that the insurance policy issued to Gerrish constituted a contract, the form of which was specifically approved for Universal's use in Vermont; that VDBI had not given Universal notice, as required by 8 V.S.A. §3541(b) and (c) and the Due Process Clause of the United States Constitution, that its prior approval of the Unicover III policy form was going to be withdrawn; and, that, in any event, VDBI had no authority under its enabling legislation, specifically 8 V.S.A. §3542, to require that liability insurance policies contain particular substantive provisions, such as pollution coverage. Universal also argued that environmental response costs mandated by the State's letter did not constitute "damages" under the insuring agreements of the policy, and that the "owned property exclusion" in the Unicover III policy defeated coverage.

After hearing, the district court held, in an opinion by the Hon. Fred I. Parker dated December 5, 1990, that: (1) Universal had notice of VDBI's departmental policy prohibiting pollution exclusions through receipt in July, 1984, of an ISO bulletin stating that the pollution exclusions contained in ISO's general liability policy form had to be deleted, and (2) that VDBI, therefore, was not required to give Universal notice of and an opportunity for a hearing on withdrawal of its prior approval of Universal's Unicover III policy form, as required by 8 V.S.A. §3541(b) and (c) (App. 87). The district court also held that: (1) VDBI, by virtue of its general authority to

approve and disapprove policy forms, could "decide[ ] as a matter of policy that it will not approve certain [substantive] types of coverage, or exclusions" (App. 52);[5] (2) that VDBI was not obligated to follow the rulemaking procedures of Vermont's Administrative Procedures Act, 3 V.S.A. §§801-849, in adopting a rule or regulation on pollution coverage because VDBI "let it be known [to ISO] what it intended to do with regard to filings pertaining to pollution coverage" (App. 52); (3) that Universal had waived the question of VDBI's jurisdiction to adopt a substantive rule on pollution coverage by not raising the issue in October, 1983, when VDBI told ISO it intended to withdraw approval of ISO's general liability policy form (App. 52); and (4) that Universal's Unicover III policy was, therefore, deemed amended by the provisions of ISO's endorsement deleting the pollution exclusion in ISO's general liability policy form. The district court concluded by holding that environmental response costs constitute damages under the insuring provisions of the policy (App. 53), and that the owned property exclusion contained in the policy did not defeat coverage. (App. 39). The court ordered Universal to afford Gerrish coverage for environmental clean-up costs in accordance with the provisions of the July 1, 1984 ISO policy endorsement.

On appeal, the Second Circuit affirmed the decision of the trial court, but on somewhat different grounds. The

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[5] The district court either overlooked or ignored 8 V.S.A. §3542, which provides that the Commissioner of VDBI can disapprove a liability insurance policy form only on one or more of four stated grounds, none of which includes any reference to substantive policy provisions of any kind, let alone to pollution coverage.

Second Circuit did not address the notice and opportunity for hearing provisions of the Vermont statute or consider Universal's argument that those provisions in the statute were constitutionally required. Nor did the circuit court consider either VDBI's jurisdiction to reject liability insurance policies on substantive grounds or the validity of VDBI's informal "no pollution exclusions" departmental policy. Indeed, the Second Circuit did not even cite Vermont's insurance regulatory statutes, but purported to base its decision on "general rules of contract and insurance law." (App. 13). After citing the "basic tenet of insurance law that once an insurance contract is accepted by both parties, the parties are bound by it" (App. 12), and finding that the "Universal Unicover III policy in the form in which it was issued to Gerrish did *not* cover [the state's pollution] claim" (App. 10) (emphasis added), the circuit court's opinion goes on to hold that Universal, by signing an ISO Authorization Form in 1982, "implicitly empowered ISO to alter the Unicover policy" (App. 11), and that the ISO endorsement approved in July, 1984 for use with ISO's generic general liability policy, therefore, serves to amend Universal's Unicover III policy.

The Second Circuit's opinion in this regard curiously does not explain why an insurance contract accepted by both parties should be "deemed" amended by an endorsement which the insured never saw and the insurer had no intention of including in the contract. At the district court level it had been assumed, as claimed in the complaint, that Vermont's insurance statutes and regulations could have the effect of amending a contract not in conformance therewith – and the district court had

found that VDBI required pollution coverage. The Second Circuit's opinion, however, which does not refer to Vermont's insurance statutes or regulations, does not rely on "conformance to law" principles to imply a contract amendment. The Second Circuit purports to rely instead on Vermont agency law, but takes a quantum leap beyond the holdings of the Vermont automobile collision cases which it cites. Vermont case law, like that of most states, holds that an agent may bind his principal in a transaction with a third party, where the third party relies upon the authority of the agent – real or apparent – in the transaction in question. *See, e.g., Blumenthal v. Brainerd*, 38 Vt. 402, 409 (1866). The Second Circuit's opinion in this case, however, binds the principal (Universal) by actions of an agent (ISO) in an unrelated transaction of which the third party (Gerrish) had no knowledge, and on which the third party, therefore, did not rely. The only possible rationale for such an extension of traditional contract and agency principles would be the operation of Vermont's regulatory statutes, but the Circuit's opinion omits any reference to those statutes. Because it did not cite the relevant insurance regulatory statutes, the Second Circuit did not address (a) Universal's argument that notice from VDBI of its intent to withdraw (or modify) Universal's previously approved Unicover III policy form was required both by the Vermont statute and by the Due Process Clause of the Federal Constitution or (b) Universal's claim that VDBI had no authority to prohibit pollution exclusions.

The Second Circuit's opinion also affirmed the district court's holding that environmental response costs constitute damages under the insuring provisions of the

policy, and that the owned-property exclusion does not defeat coverage even where the required environmental response would entail cleaning up the insured's own property.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted because the judicial decisions in this case did what neither the legislature nor the executive department of Vermont government could constitutionally have done, namely read the notice and opportunity for hearing provisions right out of the Vermont insurance regulatory statutes.

When the State of Vermont determined to subject contracts of insurance to state regulation, it built into its statutes the procedural protections which the Due Process Clause requires. Vermont statutes contain both an Administrative Procedures Act ("APA"), 3 V.S.A. §§801-849, which incorporates notice and comment provisions appropriate for generalized rulemaking, and specific insurance form filing procedures, 8 V.S.A. §3541, which contain notice and hearing provisions appropriate to individualized adjudicatory determinations. No Vermont proceeding, legislative or adjudicatory, has found those constitutionally mandated protections inapplicable to Universal's use of its pre-approved insurance policy form. Federal judicial construction, however, simply airbrushed the constitutional protections out of Vermont's regulatory scheme, thereby implicating both Universal's due process rights and serious issues of federalism. In *Bouie v. Columbia*, 378 U.S. 347 (1964), this Court found

that a due process violation was created by judicial construction of a criminal statute. This case presents an analogous situation in the civil context; that is, Universal's statutorily protected due process property rights have been infringed by judicial decision.

Insurance companies nationwide file policy forms, rates and schedules for approval by state regulatory agencies, some independently and some through reliance upon filings by ISO. As this case illustrates, carriers writing insurance policies need to know, not in a general way, but down to the letter, the comma, and the last conjunction, what form has been approved for their use. The chaos which would be occasioned if state administrative agencies were to adopt the haphazard and casual regard for notice and hearing procedures which the lower courts adopted here would be staggering. The Vermont Supreme Court has not countenanced such careless attention to the notice and hearing protections of its state's statutes. *See, e.g., In re Petition of Vermont Welfare Rights Organization*, 132 Vt. 622, 326 A.2d 828 (1974). The Second Circuit's opinion, however, which "deems" an insurance contract amended in the admitted absence of administrative regularity, leaves both insured and insurer in the dark with respect to the terms of the contract between them. In the instant case it was the insured who benefited by expansion of the contracted coverage, but nothing in the Second Circuit's opinion distinguishes the case from one in which an undisclosed amendment of a policy would inure to the benefit of the carrier.

Universal wrote insurance coverage for Gerrish on a form of policy which had received the affirmative prior approval of VDBI for Universal's use in Vermont. The

policy as written excluded coverage for pollution damage. VDBI never advised Universal that approval of its policy form was withdrawn or changed. VDBI would have been estopped, both by virtue of the affirmative approvals it gave to Universal's pollution exclusions and by its continued course of dealings with Universal to compel Universal to afford Gerrish coverage for this claim.[6]

The Vermont Supreme Court has been particularly vigilant that the administrative agencies of the state act only within their delegated powers, i.e., those set forth in their enabling legislation. *See, e.g., In re Agency of Administration*, 141 Vt. 68, 75, 444 A.2d 1349, 1352 (1982). The refusal of both the district court and the Second Circuit to hear Universal on the issue of VDBI's authority to prohibit pollution exclusions is an unseemly breach of the principles of federalism which should instruct a federal court's interpretation of state administrative and regulatory schemes.

The decisions of the district court and the Second Circuit are not just wrong and contrary to the jurisprudence of the State of Vermont, which, after all, has the primary interest in the matter at hand; the decisions impose by judicial fiat a deprivation of constitutionally guaranteed property rights.

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[6] State courts, including Vermont's, have been less loath to find their governments estopped than have been federal courts. *Compare, e.g., My Sister's Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 275 (1981) with *Heckler v. Community Health Services*, 467 U.S. 51 (1984).

The holding of the Second Circuit that environmental response costs constitute damages under the liability insurance policy also adds fuel to the conflict among the Circuits over the so-called "as damages" issue.

ARGUMENT

The notice and hearing provisions of Vermont's insurance regulatory statutes are constitutionally required.

It is by this late date settled law that an administrative agency charged with the regulation of what would otherwise be private conduct must afford the regulated who appear before it at least minimal due process protections of notice and the opportunity to be heard. *Hannah v. Larche*, 363 U.S. 420 (1960); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). (Due process requirements are, of course, made applicable to the states by the operation of the 14th Amendment.) Notice may be contained in the announcement of generalized rulemaking which, through prospective application, may affect property rights, *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), or through individualized notice of adjudicatory proceedings where general rules are applied to specific cases. *See, e.g., Goldberg v. Kelley*, 397 U.S. 254 (1970). The nature of the right which is in danger of infringement, of course, determines the extent of the process which is due. *Id.* at 263.

Vermont's APA and its insurance regulatory statutes provide for the exercise, by VDBI, of both legislative and adjudicatory functions. Vermont's APA states that:

> where due process or a statute directs or permits an agency to adopt rules, regulations or both,

> unless that statute expressly provides to the contrary, it shall be construed as requiring or permitting the agency to adopt rules in the manner provided in this chapter.
>
> 3 V.S.A. §831(a) (App. 67).

The statute then goes on to set forth conventional notice and comment provisions for administrative rulemaking, 3 V.S.A. §835-48 (App. 69-85). The Vermont APA also states that:

> no revocation, suspension, annulment, or withdrawal of any license[7] is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. . . .
>
> 3 V.S.A. §814(c) (App. 66).

The insurance regulatory statutes reiterate these notice and hearing requirements by providing that VDBI may withdraw prior approval of a policy form only after giving the insurer notice of the proposed withdrawal and an opportunity for hearing thereon. 8 V.S.A. §3541(b) (App. 87). The provision for notice is form-specific; that is, the commissioner must direct his disapproval or withdrawal of prior approval to a particular form. 8 V.S.A. §3541(b) and (c) (App. 87).

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[7] A "licensee" is defined in the prefatory section of the Vermont APA to include "the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law." 3 V.S.A. §801(b)(3) (App. 64).

While the statutes could arguably have been constructed differently, there is no doubt that the Vermont Legislature intended the provisions to comport with the mandates of due process. *Vermont Real Estate Commission v. Martin*, 132 Vt. 309, 311, 318 A.2d 670, 672 (1974) ("An administrative agency hearing on a license suspension is subject to the essentials of due process. . . . The essentials of due process are notice and the opportunity to be heard," (citations omitted)).

It is undisputed that VDBI neither adopted a rule on pollution exclusions nor gave notice of its intent to withdraw prior approval of the Unicover III policy containing pollution exclusions. VDBI would, under the circumstances, be estopped to claim that coverage existed.

In the complaint and at trial, Gerrish contended that a VDBI departmental policy prohibiting pollution exclusions rendered invalid those portions of the Unicover III policy which contain the relevant pollution exclusions. The district court relied upon the existence of a departmental policy, albeit an informal one, to "deem" Universal's policy amended to conform to VDBI's requirements, which stemmed from negotiations with ISO and resulted in ISO's "Vermont Pollution Endorsement." In the face of Universal's argument on appeal that no validly enacted VDBI policy compelled inclusion of pollution coverage in the Unicover III policy, Gerrish abandoned reliance on its claim grounded in VDBI agency policy, and the Second Circuit made no finding that such a policy existed. With the concessions, then, that rulemaking procedures had not been followed and no regularly adopted departmental policy existed, support for judicial revision of previously approved contractual terms would seem to demand

proof of compliance with statutory notice and hearing requirements for withdrawal of (or amendment to) a previously approved "license," as the Vermont APA, 3 V.S.A. §801(b)(3) (App. 64), refers to agency approval. Neither the court of appeals nor the district court found, however, that procedures for withdrawal of prior approval had been instituted. Both courts effectively held, instead, that the statutorily required form-specific notice could be dispensed with in the case of the Unicover III policy, since Universal (the proprietor of the Unicover III form) received from ISO notice that VDBI intended to withdraw approval of an ISO policy form unless it were amended to include pollution coverage.[8]

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[8] In this regard, Gerrish made much of several internal Universal office memoranda, which demonstrated that Universal had notice of VDBI action with respect to the ISO general liability policy form. The memoranda referred to are reproduced at App. 273-74. There is no doubt, as the memoranda demonstrate, that Universal was on notice that ISO's general liability policy form was amended in July, 1984, to include pollution coverage, and that the amendment was, in VDBI parlance, "mandatory." The memoranda also demonstrate that Universal took the notice from ISO about changes in the ISO policy to mean that Universal would eventually have to amend its own policy, either because of pressure from VDBI or because of the need to compete with the sale of ISO policies in the marketplace. At the same time, however, the memoranda suggest that it never occurred to Universal that the ISO endorsement could simply be tacked onto the Unicover III policy form, without its submission to and approval by VDBI for use with the Unicover III policy form. Universal's response to the ISO notice was not to start printing the ISO language for use with Universal policies, but was instead to begin to draft language for a new Universal endorsement, which would track the language of the Unicover III policy, while at the same time discussing other alternatives to providing pollution coverage.

Constitutionally required notice from an administrative agency can be waived in certain circumstances where it is apparent that the regulated entity is advised of expected agency action. In the case at hand, plaintiff was able to prove that Universal had notice of expected agency action toward another player, ISO, but offered nothing to suggest that Universal was apprised that VDBI action affected the previous stamp of approval issued to the Unicover III policy. Learning that one's neighbor will have to alter plans submitted in support of a building permit application, for example, is hardly adequate to advise the holder of a previously approved permit that his permit is now deemed amended.

The practice of VDBI, for all the years Universal dealt with them, had been to communicate directly with Universal about changes, amendments, or additional filings in connection with the Unicover III program. VDBI employees discussed Universal's filings with Universal employees over the telephone and in writing. The trial exhibits contained many items of correspondence between VDBI and Universal's Governmental Affairs Department. Not one of the more than 400 pages filed in connection with the Unicover III program between 1980 and 1985 was filed by ISO, and not one of VDBI's responses to those filings was directed to ISO. VDBI employees testified that they knew on sight that the Unicover III policy "was obviously not an ISO form being used" (App. 364), that they treated it as a separate and distinct filing (App. 407), and that they did not consult the ISO Filing Authorization Forms on file to determine whether a filing was independent of ISO (App. 364). In at least two instances, when universal sought VDBI approval to use policy language which had been approved for ISO's use, approval was denied. VDBI's

practice in this regard was consistent both with its own rules on independent filings, which make the updating and amendment of independent, i.e., non-ISO forms, the responsibility of the filing carrier, VDBI Reg. 81-3, Sec. VIII (App. 313-14), and with 8 V.S.A. §3541 (App. 87), which contemplates form-specific approval or disapproval of filed forms.[9]

An administrative agency which adopts regulations and practices for conducting its business must act in a manner consistent therewith. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). A governmental agency's failure to follow its own procedures, even where not mandated by statute, may preclude that agency from taking action which affects the rights of an individual dealing with the agency. *See, e.g., Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301, 306-07 (2d Cir. 1976). In Vermont, at least, a governmental agency which has lulled another into inaction by its assurance that individual notice will be provided is estopped to benefit from the other's inaction. *Village of*

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[9] Given the attention to detail that must attend the drafting, filing and administrative approval of insurance policy forms, a filing system not directed to specific forms would be unthinkably chaotic. Vermont statutes are very clear that VDBI "shall disapprove" a form of liability policy if it contains clauses that are "inconsistent, ambiguous or misleading." 8 V.S.A. §3542(2) (App. 89). If forms were approved by reference to similar filings by other insurers, or to vague departmental positions on issues of social worth, such as the allocation of the costs for environmental clean-up, rather than by reference to the specific language of the particular form being examined there would inevitably be inconsistencies and ambiguities. Moreover, neither insurer nor insured could comfortably assume that the policy he held in his hand was the contract which governed his relationship with the other.

Morrisville Water & Light Dept. v. Town of Hyde Park, 129 Vt. 1, 3, 270 A.2d 584, 586 (1970), cited with approval in *My Sister's Place v. City of Burlington,* 139 Vt. 602, 609, 433 A.2d 275, 279 (1981). While this Court has been reluctant to find the federal government estopped by the conduct of its employees when the public treasury will be charged, *Schweiker v. Hansen,* 450 U.S. 785 (1981), this case does not involve depletion of public funds. Moreover, even while announcing a general distaste for estoppel by government, this Court has quoted Justice Black's observation that:

> It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting), quoted in *Heckler v. Community Health Services,* 467 U.S. at 61, fn. 13. If VDBI itself had sought to compel Universal to provide coverage in accordance with the terms of ISO's Vermont endorsement, VDBI would have been estopped, under Vermont law, by its own failure to give Universal statutory notice, coupled with its prior conduct in treating the filings as independent of ISO, from asserting that Universal could not write coverage on the approved Unicover III form. *Village of Morrisville v. Town of Hyde Park, supra.*

Vermont's Supreme Court has consistently held that where statutory notice of intent to withdraw approval of a license or permit is mandated, generalized rulemaking or a change in agency position is not sufficient to amend the license. Vermont law also holds that an administrative agency cannot exceed its delegated authority.

The Vermont Supreme Court has on several occasions considered the effect on existing licenses or permits of

changes in the granting agency's rules or policies of general application. In both *In re Petition of Vermont Welfare Rights Organization,* 132 Vt. 622, 326 A.2d 828 (1974), and *Carpenter v. Home Telephone Co.,* 122 Vt. 50, 163 A.2d 838 (1960), for example, the Vermont Supreme Court held that the Public Service Board could not, even through valid APA rulemaking with appropriate notice and comment procedures, affect a utility's individually filed rate schedule previously approved by the Board, where the statute specified procedures for withdrawal of an approved rate schedule: "rate schedules on file with the Public Service Commission become lawful rates which remain in force until changed in the manner prescribed by statute." *Carpenter v. Home Telephone Co.,* 122 Vt. at 53, 163 A.2d at 841 (citations omitted).

In the instant case, the district court and the Second Circuit dispensed with the requirement for either rulemaking or individualized notice, and found a negotiated agreement with ISO sufficient to amend Universal's approved license.

The Vermont reports are also replete with cases where the Vermont Supreme Court has admonished administrative agencies to "operate for the purposes and within the bounds authorized by [their] enabling legislation." *In re Agency of Administration,* 141 Vt. 68, 75, 444 A.2d 1349, 1352 (1982). *See also, e.g., In re Vermont Gas Systems, Inc.,* 150 Vt. 34, 549 A.2d 627 (1988); *New Hampshire-Vermont Physician Service v. Commissioner,* 132 Vt. 592, 596, 326 A.2d 163, 166 (1974) (Commissioner of Banking and Insurance not authorized to "control aspects of contract coverage"). Universal endeavored from the outset of this litigation to raise the issue of VDBI's authority

to prescribe the substantive provisions of a liability insurance policy. The district court found that Universal had waived the issue of authority (App. 52) despite this Court's decisions in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311, n. 10 (1979) and *McKart v. United States*, 395 U.S. 185, 197 (1960) that an agency's authority to act is a question of subject matter jurisdiction which is not waived by failure to raise it before the agency. The Second Circuit simply ignored the issue. The lower courts themselves thereby prescribed the substantive provisions of the liability insurance policy Universal issued to Gerrish.

In an unwarranted intrusion upon Vermont jurisprudence, the federal courts in this case have, by judicial construction, deprived a party of basic due process protections.

In *Bouie v. Columbia*, 378 U.S. 347 (1964), this Court held that due process protections preclude a federal court from applying an expanded definition of criminality to conduct which occurred prior to adoption of the new standard. Interpreting *Bouie*, the Ninth Circuit Court of Appeals has noted that "[i]t is whether an act of judicial enlargement has occurred . . . that is determinative of the due process question." *United States v. Goodheim*, 651 F.2d 1294, 1298 (9th Cir. 1981). The Sixth Circuit Court of Appeals has noted that:

> The federal courts of appeals have universally suggested that the right to due process prevents judicially wrought retroactive increases in levels of punishment [in the criminal context] in precisely the same way that the ex post facto clause does when the changes are produced by legislation. . . .

> Circuit courts have typically echoed language in *Bouie* suggesting that 'a state Supreme Court is barred by the due process clause from achieving by judicial construction a result which a state legislature could not obtain by statute.'

Dale v. Haeberlin, 878 F.2d 930, 934 (6th Cir., 1989). In this case, the federal courts have, by judicial construction, required Universal to pay hundreds of thousands of dollars of environmental response costs under the terms of an insurance policy it never wrote, for which it never charged a premium, and with respect to which it never had opportunity to inquire about the extent of the risk underwritten[10] – a deprivation of basic due process notice and hearing requirements which could not have been accomplished by statute, and which would not have been countenanced by the Vermont Supreme Court.

The "as damages" issue warrants this Court's review.

Finally, the holding of the Second Circuit that Universal must bear the financial burden of any environmental response costs that Gerrish may be ordered to pay fuels the fire of controversy that rages among the circuit courts over the so-called "as damages" issue. Presently, four circuits have interpreted the standard insurance policy language, which appears in Gerrish's Unicover III policy, that obligates the insurer to pay all sums which the insured legally must pay "as damages" to encompass

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[10] Gerrish knew that approximately 5,000 gallons of gasoline had escaped from an underground storage tank on his property well before the policy at issue was written. Universal did not inquire about such risks because the policy it wrote excluded pollution coverage.

environmental response or clean-up costs[11] and four circuits have held that the term "damages," as used in the insurance policies at issue, does not encompass such equitable or restitutionary relief.[12] Curiously, in

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[11] *Avondale Industries, Inc. v. Travelers Indemnity Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2588 (1990) (under New York law, clean-up costs come within comprehensive general liability coverage "as damages"); *New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162 (3rd Cir. 1991) (under Delaware law, the term "damages" as used in insured's general liability policy encompasses response costs and other equitable relief the insured was required to pay); *Aetna Casualty and Surety Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (holding that, under Idaho law, CERCLA response costs constitute "damages" as that term is used in insured's general liability policy); *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991) (under Missouri law, "damages" included costs the insured was legally obligated to pay the United States and state as reimbursement for activities in remedying environmental harm).

[12] *A. Johnson & Co., Inc. v. Aetna Casualty and Surety Co.*, 933 F.2d 66 (1st Cir. 1991) (under Maine law, administrative and clean-up costs were held equitable in nature and, therefore, not "damages" under insured's policy); *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325 (4th Cir. 1986) (CERCLA response costs are economic loss and not equated with "injury to or destruction of tangible property," the policy at issue's definition of property damage); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987) (CERCLA claim made against insured for injunctive and restitutionary relief not a claim for "damages" under insured's general liability insurance policy); *Aetna Casualty and Surety Co. v. Hanna*, 224 F.2d 499 (5th Cir. 1955) ("damages," as distinguished from injunctive or restitutionary relief, includes only payments to third persons with a legal claim for damages); *Continental Insurance Cos. v.*

(Continued on following page)

apparently only one case involving a dispute over a pollution exclusion in an insured's general liability policy has a circuit court certified the issue to the relevant state court.[13] This fact is of particular relevance where, in the instant case, there is nothing in Vermont law which compelled the district and circuit courts to hold as they did on this issue.

The present controversy concerning the "as damages" issue was recently forthrightly addressed by the Eighth Circuit:

> [S]tandard form CGL insurance policies use virtually the same language around the country, and general principles of insurance law do not vary greatly from state to state. The real issue, of

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(Continued from previous page)

Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988) (under Missouri law, "damages" in the standard comprehensive general liability insurance policy does not include clean-up costs); *Parker Solvents Co. v. Royal Insurance Cos.*, 950 F.2d 571 (8th Cir. 1991) (hereinafter *Parker Solvents*) (under Arkansas law, clean-up costs not encompassed within meaning of the word "damages" in standard form comprehensive general liability insurance policy); *Grisham v. Commercial Union Insurance Co.*, 951 F.2d 872 (8th Cir. 1991) (echoing holding of *Parker Solvents*).

[13] In *Claussen v. Aetna Casualty & Surety Co.*, 888 F.2d 747 (11th Cir. 1989) where there was a dispute between the insured and the insurer over the meaning of the word "sudden," the Eleventh Circuit, recognizing that the issue involved interpretation under Georgia law of the pertinent pollution exclusion and policy language and that similar provisions and language have received conflicting interpretations in other jurisdictions, certified the question of liability to the Supreme Court of Georgia.

> course, is whether the insurance industry should be compelled to help finance an immense environmental clean-up obligation that was not anticipated, by insureds or insurers, at the time these policies were written. On this difficult issue, which transcends state boundaries and has important public policy implications, it is not surprising that judges disagree.

Parker Solvents, 950 F.2d at 572. Accordingly, because of the decisive split among the circuit courts, the federalism and due process issues involved, and the far reaching and potentially crippling public policy concerns unleased, the "as damages" issue cries out for the wisdom of this Court and the exercise of this Court's supervisory powers.

CONCLUSION

The district court and the Second Circuit, in their eagerness to find available insurance coverage for environmental response costs, have stripped the Vermont statutes of the due process protections provided by the Vermont Legislature. The judicial decisions of the lower courts so far depart from the accepted and usual course of judicial proceedings in this regard that a grant of certiorari is appropriate.

Respectfully submitted,

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March, 1991

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1480 August Term, 1990

(Argued May 22, 1991 Decided October 30, 1991)

Docket No. 91-7008

GERRISH CORPORATION, doing business as Gerrish Motors, doing business as Scrub-a-Dub,

Plaintiff-Appellee,

v.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Defendant-Appellant.

Before: VAN GRAAFEILAND, MESKILL and McLAUGHLIN, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the District of Vermont, Parker, *J., Gerrish Corp. v. Universal Underwriters Ins. Co.*, 754 F.Supp. 358 (D. Vt. 1990), declaring that appellant Universal Underwriters' policy as amended by Insurance Services Organization required Universal Underwriters to defend appellee Gerrish Corp. and that Universal Underwriters could be liable for cleanup costs as well as other damages.

The judgment of the district court is affirmed.

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William H. Allen, Saul B. Goodman, William F. Greaney, Stanlake J.T.M. Samkange, Covington & Burling, Washington, D.C., on the brief,
for Amici Curiae The American Petroleum Institute, The American Fiber Manufacturers Association, International Business Machines Corporation, and Olin Corporation.

MESKILL, *Circuit Judge*:

In this diversity action we must determine whether an insurance organization authorized to act on behalf of member insurance companies can substantively alter a policy of insurance that was traditionally amended only by the insurance company and whether environmental

response costs fall within the meaning of "damages" under a general liability policy.

This is an appeal from a judgment of the United States District Court for the District of Vermont, Parker, *J.*, entered on December 5, 1990. *See Gerrish Corp. v. Universal Underwriters Ins. Co.*, 754 F.Supp. 358 (D. Vt. 1990). The judgment declared that appellant Universal Underwriters Insurance Company (Universal) was required to defend appellee Gerrish Corporation (Gerrish) in an environmental action threatened by the State of Vermont. The judgment also proclaimed that Universal could be responsible for the payment of cleanup costs as well as for other damages. Universal appeals claiming that the liability policy issued to Gerrish excluded coverage for Vermont's pollution claim, that Insurance Services Organization (ISO) did not amend the Gerrish policy, that environmental response costs are not recoverable as damages under the Gerrish policy, and that Gerrish cannot succeed in this action because of the "owned property" exclusion in the policy.

We agree with the district court that the policy issued by Universal to Gerrish was amended by ISO, that the policy covers Vermont's pollution claim, that environmental response costs are damages as that term is used in the policy and that the "owned property" exclusion does not bar Gerrish's claim. We therefore affirm the judgment of the district court.

BACKGROUND

The background of this litigation, filed under the Federal Declaratory Judgments Act, 28 U.S.C.A. § 2201, is

set forth in the opinion of Judge Parker. 754 F.Supp. 358. The facts relevant to this appeal are summarized below.

Gerrish, a Vermont corporation with its principal place of business in Woodstock, Vermont, is the owner of Woodstock East, a small shopping center in Woodstock, Vermont. Two of the businesses on the property are Gerrish Motors, an automotive dealership, and Scrub-a-Dub, a car wash and gas station, both of which are subdivisions of Gerrish.

Defendant, Universal is a stock insurance company with its principal place of business in Kansas City, Missouri. Universal is licensed to engage in the business of selling insurance in the State of Vermont. On September 1, 1984 Universal issued a general liability policy, hereinafter the Unicover III policy, covering the Gerrish property. The events that led to the instant controversy are outlined below.

In November 1973 Scrub-a-Dub realized that approximately 4,785 gallons of gasoline had been lost from its underground fuel storage tanks. The tanks were tested, excavated, and a tank thought to be leaking was replaced. Gerrish made no attempt to clean up the subsurface spilled gasoline. Gerrish subsequently leased the Woodstock East property and shopping center to Woodstock Associates but, through various lease and leaseback arrangements, Gerrish retained ownership, possession and control of the Scrub-a-Dub facilities.

On May 2, 1985 Gerrish was notified by Vermont's Agency of Environmental Conservation that petroleum pollution emanating from Woodstock East was migrating into neighboring property and into a natural drainage

stream that emptied directly into the Ottauquechee River, creating a hazard to the public and the environment. Vermont advised that Gerrish could on its own take corrective measures under Agency supervision to alleviate the harm. Alternatively, if Gerrish failed to take action, the Agency of Environmental Conservation would arrange for the cleanup and would seek reimbursement from Gerrish. Vermont informed Gerrish that a State-managed cleanup is typically more expensive than a privately undertaken environmental response. Prior to its discussions with Vermont, Gerrish was unaware of the existence of any underground contamination on the Woodstock East property.

On June 11, 1985 Gerrish contacted Universal, its insurer, and demanded that Universal be responsible for all costs involved in monitoring and cleaning up the source of the pollution under the policy issued by Universal to Gerrish for the September 1, 1984 to September 1, 1985 period.

The Universal Unicover III Policy

The original policy issued to Gerrish by Universal was the Unicover III Motor Vehicle Dealers Policy approved by the Vermont Department of Banking and Insurance (VDBI) in 1980. The policy obliged Universal to "pay all sums which the INSURED legally must pay as damages . . . because of INJURY" to which the policy applies. The policy defined "INJURY" as "bodily injury, sickness, disease, or disability . . . or damage to or loss of use of tangible property." The policy contained certain

exclusionary language in Part 500 Garage Coverage, including the following:

> Exclusions – This insurance does not apply to:
>
> . . . .
>
> (m) INJURY caused by the dumping, discharge, or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental;
>
> (n) INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course, regardless of the nature of the discharge, release, or escape (whether accidental or not).

The same language was included in Part 950 General Liability Coverage in sections labelled (e) and (f).

Two other pertinent exclusions were included in the general liability portion of the Unicover III policy. They state:

> Exclusions – This insurance does not apply to:
>
> . . . .
>
> (k) INJURY to property owned by, rented or leased to, used by, or in the care, custody or control of the INSURED. . . .
>
> (l) INJURY to premises after YOU transfer ownership or possession to another, if INJURY is caused prior to the transfer.

Although Universal revised the Unicover III policy several times between 1980 and 1985, none of those alterations affected any of the exclusions quoted above.

Universal is a member of ISO, an insurance rating organization comprised of insurance companies. ISO provides various services for its members, including the drafting and filing of insurance forms with various state insurance departments. In 1982 Universal signed a broad authorization (Authorization), empowering ISO to act on its behalf before the VDBI and filed it with Vermont's Commissioner of Insurance. The document authorized ISO to file "rates, rules, [and] forms" with respect to general liability insurance, as well as several other insurance areas. Universal did not limit ISO's authority with respect to general liability insurance policies or pollution exclusions. The Authorization contained a provision that stated: "This Filing Authorization shall be deemed amended to the extent that any filing is made in your office directly by the undersigned company and is inconsistent with the filing of said Insurance Services Office."

In a circular dated June 4, 1984 ISO notified all its members that a new pollution endorsement had been developed, filed with the VDBI and approved for use. The new pollution provision provided insurance coverage for all pollution incidents, whether sudden or not, on a claims-made basis, subject to an aggregate limit, and was to be included in all ISO members' policies issued after July 1, 1984. The ISO circular informed members that they were automatically deemed to accept the endorsement; they had to contact the VDBI prior to July 1, 1984 if they did not want to be bound by the terms of the ISO endorsement. Universal did not contact the VDBI with respect to the endorsement. Furthermore, Universal had no relevant contact with the VDBI after receiving the ISO circular and before issuing the Gerrish insurance

policy. A Universal interoffice memorandum made it clear that Universal was aware of the endorsement.

On September 1, 1984, while ISO's pollution endorsement was still in effect, Universal issued a general liability and automotive dealer insurance policy, the Unicover III policy, to Gerrish.

In April and May of 1985 Universal submitted to the VDBI multiple endorsements affecting pollution coverage under the Unicover III policy. After several exchanges between Universal and VDBI and subsequent to Vermont's claim against Gerrish, the endorsements were approved with the proviso that whenever Universal specifically excluded pollution coverage under an insurance policy an Individual Risk filing had to be made with the VDBI.

Procedural Background

Based on the original Unicover III policy issued to Gerrish and the endorsements and amendments filed by Universal, Universal claimed that it would not cover the costs of cleaning up the Woodstock East fuel spill. Universal claimed that it never amended the Unicover III pollution exclusions, that the Gerrish fuel spill was definitely excluded under the policy as originally written and, therefore, Gerrish was not covered.

Gerrish commenced this action in the United States District Court for the District of Vermont seeking a declaratory judgment that the Unicover III policy issued by Universal provided coverage for the gasoline cleanup claim asserted by Vermont.

Universal responded that the Unicover policy, which Universal claimed was unaffected by either Universal or ISO filings, excluded coverage of Gerrish's claim. Universal claimed that the VDBI had never withdrawn approval of the Unicover III policy as approved in 1980 and therefore continued use of that policy was appropriate. If the VDBI had established a practice of requiring pollution coverage in all insurance policies, urged Universal, not only was Universal unaware of the practice, but maintenance of such a practice was beyond the power of the VDBI. Universal also contended that the cleanup or "response" costs for the gasoline contamination were not tantamount to damages under the policy because they were equitable in nature, not legal under Vermont law. Finally, Universal contended that the "owned property" provision of Exclusion (k) found in the general liability part of the policy excluded coverage of the claim. Universal, therefore, maintained that it was not responsible for providing coverage for the gasoline cleanup.

The district court found that the Universal Unicover III policy as originally issued excluded Gerrish's claim. While the court concluded that VDBI had authority to establish practices with respect to insurance exclusions, the court did not base its decision on this holding. The court went on to rule that the Unicover III pollution exclusions were negated by the 1984 ISO pollution endorsement. Thus, the district court concluded that under Vermont law, which we must apply, *Erie v. Tompkins*, 304 U.S. 64 (1938), Gerrish was covered by the Unicover III policy as amended by the ISO, including pollution cleanup costs. Furthermore, the court found that the "owned property" exclusion did not bar the

claim. In sum, the district court granted Gerrish the declaratory judgment.

Universal appeals and reasserts on appeal the arguments raised below.

DISCUSSION

First we must determine whether the policy provided coverage to Gerrish for injury resulting from gasoline-related pollution.

Universal contends that Gerrish is not covered for this gasoline leak because as the district court held, the Unicover III policy as originally issued to Gerrish did not cover Vermont's claim, the VDBI never withdrew approval of the Unicover III policy and Universal never amended the pollution exclusions prior to Vermont's claim against Gerrish. Universal also raises an argument with respect to the practice of the VDBI in approving policies and requiring certain types of coverage. Universal claims that the VDBI lacks authority to withhold approval of policies until a specific type of coverage is provided. Universal urges that it was just such a practice of the VDBI that prompted ISO to file the pollution endorsement. What motivated the filing of the endorsement is irrelevant however. It is the effect of that endorsement that controls the outcome in this case.

We agree with the district court that the Universal Unicover III policy in the form in which it was issued to Gerrish did not cover Vermont's claim. The original policy language explicitly excludes from coverage the type of claim raised here. We conclude, however, that the

policy was amended by Universal's agent, ISO, to provide coverage for this claim. The basis for this conclusion is rooted in the law of agency.

Under general agency principles the following holds true:

> § 140. Liability Based upon Agency Principles
>
> The liability of the principal to a third person upon a transaction conducted by an agent- . . . may be based upon the fact that:
>
> (a) the agent was authorized;
>
> (b) the agent was apparently authorized; or
>
> (c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority.

Restatement (Second) of Agency § 140, at 349 (1958).

Universal signed an authorization in 1982 permitting ISO to file, on Universal's behalf, amendments to its general liability policies. Universal did not limit that Authorization with respect to these policies or to the Unicover III policy specifically, nor did Universal ever withdraw the Authorization prior to Vermont's claim against Gerrish. Although Universal typically amended the Unicover III policy independently, it did not reserve the exclusive right to alter the Unicover III policy. When Universal filed the Authorization in 1982, it implicitly empowered ISO to alter the Unicover policy.

The existence of an agency relationship may be shown in many ways. In an agency relationship, the

agent has the power "to subject his principal to liability for an act done in furtherance of the agency." *Young v. Lamson*, 121 Vt. 474, 476, 160 A.2d 873, 875 (1960) (citing *Ploof v. Putnam*, 83 Vt. 252, 255, 75 A. 277, 277 (1910)). "[T]he real test, as to third persons, is whether the act, however trivial, is done by one for another, with the knowledge of the person sought to be charged as master, with his assent, expressed or implied, even though there was no specific request on his part to do the act in question." *Young*, 121 Vt. at 477, 160 A.2d at 875 (interpreting law of agency with respect to operation of motor vehicles) (citing *Brown v. Gallipeau*, 116 Vt. 290, 293, 75 A.2d 694, 696 (1950)). In the instant case ISO clearly acted on behalf of Universal with Universal's knowledge and with the authority conferred by Universal. In sum, ISO was Universal's agent and was empowered to bind Universal.

Universal claims that even in an express agency context, absent reliance by a third party to the detriment of that third party, there can be no liability on the principal. In so arguing, Universal attempts to circumvent basic principles of contract and insurance law. The ISO endorsement was, in effect, part of the insurance contract between Universal and Gerrish. The ISO endorsement affected all policies issued after July 1, 1984. The Gerrish policy was issued on September 5, 1984, while the ISO endorsement was in effect. The ISO endorsement, therefore, affected the Gerrish policy and negated the original pollution exclusions therein set forth.

It is a basic tenet of insurance law that once an insurance contract is accepted by both parties, the parties are bound by it. *See* 1 *Couch Cyclopedia of Insurance Law*

§ 12:16, at 807 (Rev. 2d ed. 1984). An insured, absent fraud or misrepresentation, is bound by the terms of the policy and "cannot thereafter complain that he did not read or know its terms." *Id.* Likewise, the insurer is bound by those same terms, regardless of whether the insured is aware of them. The parties are bound to the terms of the policy on the formation of a contract of insurance. A contract is formed when the insured accepts a policy and pays the premium and the insurer accepts the premium. By accepting the policy and paying the premiums the insured agrees to the terms of the insurance contract. By the same token, when the insurer issues a policy and accepts payment for insurance coverage under that policy, the insurer agrees to assume the risks enunciated in the policy. *See* 6 *Couch Cyclopedia of Insurance Law* § 31:10, at 19-20 (Rev. 2d ed. 1985).

Applying these general rules of contract and insurance law to the instant case, we see that Gerrish was entitled to coverage for the State's pollution claim regardless of any lack of awareness on its part of the specific terms of the contract. The pollution endorsement filed by ISO affected all policies issued after July 1, 1984, including the Gerrish policy. Despite Gerrish's lack of awareness of its inclusion, the pollution endorsement was part of the Unicover III policy, approved by the VDBI, for which Gerrish contracted and on which Gerrish paid premiums. Universal failed to opt out of the endorsement prior to issuing the policy to Gerrish. It accepted the premiums tendered by Gerrish for the amended Unicover III policy. As already stated, Universal was undeniably aware of the endorsement. The contract of insurance

formed between Gerrish and Universal, therefore, included the ISO pollution endorsement.

Universal contends that because the ISO endorsement was inconsistent with the original policy and prior Universal amendments to it the Authorization did not apply to the endorsement. This argument is based on the inclusion in the Authorization which states:

> This Filing Authorization shall be deemed amended to the extent that any filing is made directly by [Universal] and is inconsistent with the filing of said Insurance Services Office.

Under Universal's interpretation, any ISO filing inconsistent with anything previously filed by Universal would be deemed amended by the relevant Universal filing. This explanation, however, is inconsistent with the ISO Authorization itself. ISO was empowered to make filings and to file amendments and endorsements on behalf of its members, including Universal. An "amendment" to a policy is, by definition, "a change for the better; improvement" or "a correction of errors, faults, etc." *Webster's New World Dictionary* 43 (2d College ed. 1970). A "change" or "correction" is necessarily different from or perhaps inconsistent with that which is being changed or corrected. Furthermore, the ability to amend implies the existence of some pre-existing filing to be amended. Thus, there had to be a policy in existence, whether filed by Universal or ISO, in order for ISO to amend a policy. The Authorization permitting ISO to file amendments would be eviscerated if we accepted Universal's interpretation and concluded that ISO was not permitted to amend the existing policies. We reject such an interpretation.

Universal's position also fails to recognize the time sequence implicit in the ISO Authorization. The Authorization is "deemed amended" when Universal makes a filing inconsistent with a filing by ISO. A Universal filing cannot be inconsistent with an ISO filing unless there is a pre-existing ISO filing at the time the Universal filing is made. In the instant case, Universal made no relevant filings between the date the ISO amendment was submitted to the VDBI for approval and the date of issuance of Gerrish's policy. Universal, therefore, made no filings inconsistent with ISO filings such that the Authorization should be deemed amended prior to the issuance of the policy to Gerrish.

We conclude that the district court correctly held that the ISO pollution endorsement applied to the Gerrish policy and afforded Gerrish coverage against the State's claims.

Universal next contends that the district court erred in concluding that the environmental response costs involved in the State's claim are "damages" as the term is used in the Unicover III policy and that the "owned property exclusion" in the policy was inapplicable. Universal bases its claim on the language of the policy. Coverage Part 950 – General Liability states, under the heading "Insuring Agreement," that Universal "will pay all sums which the INSURED legally must pay as damages . . . because of INJURY to which this Coverage Part applies." Exclusion (k), the "owned property" exclusion also contained in Coverage Part 950, states: "This insurance does not apply to: INJURY to property owned by, rented, or leased to, used by, or in the care, custody or control of the INSURED." Injury is defined in the policy

as "damage to . . . tangible property." Universal's interpretation of these portions of the policy and its technical reading of the terms result in its conclusion that environmental response costs are not sums that Gerrish must legally pay as damages because of injury, and that costs to clean up Gerrish's land are excluded under the policy. Universal's arguments are unpersuasive.

The term "damages" is not defined in the Unicover III policy issued to Gerrish. Vermont law provides some guidance on this issue however. Vermont law is clear that policies are to be interpreted in favor of complete coverage. *See City of Burlington v. Glens Falls Ins. Co.*, 133 Vt. 423, 424, 340 A.2d 89, 90 (1975). Limitations and exclusions in policies are to be strictly and narrowly construed. *Id.* We find no cases interpreting Vermont law, however, that determine whether environmental response costs or cleanup costs constitute damages. Other courts are split on this issue. *Compare, e.g., Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989) (under New York law damages include cleanup costs), *and Ray Indus. v. Liberty Mut. Ins. Co.*, 728 F.Supp. 1310, 1314-15 (E.D. Mich. 1989) (under Michigan law "suit" includes environmental cleanup action and insurer must defend), *with Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352-54 (4th Cir. 1987) (cleanup costs not damages under Maryland law), *cert. denied*, 484 U.S. 1008 (1988). The question is further clouded by the fact that the damages must be "for injury," and "injury" is defined in the policy as "damage" to property.

In an earlier case we were required to construe under New York law the term "damages" in an insurance policy containing pollution exclusions similar to those in the

instant case. *See Avondale*, 887 F.2d 1200. In *Avondale* we concluded that the term "damages," when given its natural meaning, could include cleanup costs, particularly because an ordinary businessman reading the policy would believe that "damages" included such costs.

Vermont, like New York, requires that the language in an insurance policy be given its plain and ordinary meaning. *Kusserow v. Blue Cross-Blue Shield Plan of N.H.-Vt.*, 140 Vt. 328, 333, 437 A.2d 1114, 1117 (1981). The Unicover III policy states that Universal "will pay all sums which the INSURED legally must pay as damages . . . because of INJURY to which this Coverage Part applies." We conclude that the plain and ordinary meaning of this clause is that Universal agreed to pay all sums Gerrish was ordered by a court to pay, regardless of the technical, legal characterization of the particular judgment. Even if we conclude that the term "damages" is ambiguous, however, the result is the same because under Vermont law all ambiguities in an insurance contract must be construed in favor of the insured. *Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 500, 536 A.2d 914, 916 (1987). In this instance, construing the term "damages" in favor of Gerrish results in coverage under the policy. Thus, if Gerrish is ordered by a court to pay the environmental response costs associated with the gasoline leak, Universal must bear the financial burden. We believe that the Vermont courts would reach the same conclusion. *Cf. Bean v. Sears, Roebuck & Co.*, 129 Vt. 278, 282, 276 A.2d 613, 616 (1971) (repair and restoration costs may be a proper measure of damages under Vermont law).

The district court also correctly concluded that because property beyond that owned, used, or controlled by Gerrish was damaged, Exclusion (k) of Part 950 of the Unicover III policy did not apply. Universal disputes this, claiming that Gerrish failed to provide evidence that any other landowner suffered a loss of use of his property or diminution in property value as a result of the gasoline leakage. We find Universal's argument unpersuasive.

The pollution at issue in the instant case was, at the time of the district court decision, "a plume of petroleum product (dissolved hydrocarbons in groundwater) which is located in the subsurface strata of the Woodstock East property. It has migrated to an adjacent property of the Marble Bank as well as into the right of way for a public highway (Route 4)." It was also found that the pollution is entering a "natural drainage stream" flowing into the Ottauquechee River. Universal admits that the petroleum seepage may demonstrate "an imminent and substantial threat to the environment." The presence of the pollution in the drainage stream and Ottauquechee River and groundwater clearly represent actual damage to the surface and groundwater and deterioration of the groundwater quality both on and off of the Gerrish property. While the specific effects of this pollution migration have not been provided, such effects are not required in this declaratory judgment action. It is only proof of damage to property not owned, controlled or possessed by Gerrish that must be proffered. Gerrish has met this burden. Its claim is not barred by Exclusion (k). Universal, therefore, is responsible for the cleanup costs of the property damaged by the plume. This may require Universal to bear the cost to clean up the leakage on Gerrish's property for

the purpose of abating seepage to neighboring property. The cost of repairing Gerrish's property is inextricably linked to Vermont's claims. We agree with the district court that the cost of "on premises remedial work, as well as any off premises remediation, is not excluded by the language of exclusion (k)." 754 F.Supp. at 366.

CONCLUSION

We conclude that the ISO endorsement applied to the Gerrish policy. The endorsement negated Universal's pollution exclusions and required that Universal provide coverage to Gerrish for the State of Vermont's pollution claim. We further conclude that the environmental response costs fall within the definition of damages as that term is used in the insurance policy issued by Universal to Gerrish. In so holding, we do not pass upon the merits of Vermont's claims against Gerrish.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GERRISH CORPORATION, *et. al*, Woodstock East Woodstock, Vermont	:	
Plaintiff	:	Civil Action
v.	:	File No. 89-19
Universal Underwriters Insurance Company Kansas City, Missouri	:	(Filed Dec. 5, 1990)
Defendant.	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER

I. INTRODUCTION

In this Declaratory Judgment action, plaintiff, Gerrish Corporation (hereinafter "Gerrish or plaintiff") seeks a declaratory judgment, declaring that a liability insurance policy ("the policy") issued by Universal Underwriters Insurance Company (hereinafter "Universal, or defendant") to Gerrish, provides coverage for a petroleum pollution clean-up claim, asserted against Gerrish by the State of Vermont on May 2, 1985. Universal opposes plaintiff's petition and requests that the Court issue a declaratory judgment that the Policy does not provide coverage for plaintiff's claim. The case was tried to Court commencing October 24, 1990.

II. FINDINGS OF FACT

Jurisdiction and Venue

1. This action is filed under the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201 (West Supp. 1990).

2. Plaintiff, Gerrish d/b/a/ Woodstock East, d/b/a Gerrish Motors and d/b/a/ Scrub-A-Dub is a Vermont Corporation with a principal place of business in Woodstock, Vermont.

3. Defendant, Universal is a stock insurance company with its principal place of business in Kansas City, Missouri. Universal is licensed to engage in the business of selling insurance in the State of Vermont and has, for at least twenty years, submitted its insurance forms and rates for approval to the Vermont Department of Banking and Insurance and sold policies in Vermont.

Background

4. Plaintiff is the owner of a shopping center in Woodstock, Vermont, known as "Woodstock East". Kurt Gerrish (a shareholder of Gerrish) has owned a portion of the realty on which Woodstock East sits, since 1963 and obtained the rest of the property in fee simple on May 29, 1967. Mr. Gerrish conveyed all the property he owned, consisting of 7 acres, to Gerrish on May 29, 1968. The portion known as Woodstock East is approximately 4.8 acres.

5. Plaintiff has developed the Woodstock East property since 1968 and the property now includes approximately 15 retail stores and 8 apartments. Plaintiff also operates two other businesses on the property, one of

which is Gerrish Motors, an automotive dealership, and Scrub-A-Dub, a car wash and retail petroleum sales facility. Scrub-A-Dub and Gerrish Motors are corporate divisions of Gerrish. Scrub-A-Dub sold petroleum products at retail to customers of Gerrish Motors and others.

6. During 1972, Woodstock Structures, Inc. installed oil storage tanks at Woodstock East as a part of Scrub-A-Dub's retail sales business. Retail sales began during November 1972 and over the next year in excess of 75,000 gallons of petroleum were sold.

7. During November, 1973, Scrub-A-Dub discovered that approximately 4,785 gallons of gasoline had been lost due to either a gasoline spill or theft.

8. The tanks were air pressure tested to determine whether the tank system might be faulty. The tanks were thereafter excavated and a tank thought to be leaking was replaced. At that time, it was determined that the leak was actually caused by a cracked pipe fitting, which was also replaced. (Plaintiff's Exhibit 13 – an invoice for the fitting repair.) The tanks themselves had no evident leaks.

9. On September 8, 1975 Gerrish settled a claim against Woodstock Structures, Inc., the contractor for the gas island for Scrub-A-Dub, and Wyman, Inc., a subcontractor, for the then known damage resulting from the gas leak. Gerrish received $2,085.96 for the value of the lost gasoline product and released Woodstock Structures and Wyman from damages it sustained. (Plaintiff's Exhibit 65.)

10. The settlement did not include any payment for pollution clean-up. Between the date of settlement and

May 6, 1985, when Gerrish received the State's Pollution Claim, Gerrish had no knowledge that pollution contamination had resulted from the gasoline spill.

11. From the time of the gas spill in 1972-73 until this claim arose, there have been no material changes to the subsurface structure of the Woodstock East property except for the installation of a "French drain" in 1981 or 1982. The "French drain" is an underground drainage line which drains the property, in part, into a tributary of the Ottauquechee River.

12. On May 31, 1984, Gerrish leased its Woodstock East premises to Woodstock East Associates (a Vt. limited partnership) for a term of five years with an option to purchase. The option to purchase has not been exercised. Gerrish continues to hold title in fee simple to the leased property. (Plaintiff's Exhibit 69.)

13. On May 31, 1984, Gerrish also entered into other leases with Woodstock East Associates, leasing back a portion of the premises. Gerrish thereby retained ownership, possession and control of the Scrub-a-Dub facilities, including the gasoline islands, tanks, piping and underlying land. (Plaintiff's Exhibit 68.)

Pollution Claim by Agency

14. On May 2, 1985, the State of Vermont through the Agency of Environmental Conservation, ("Agency") notified plaintiff that Woodstock East was the source of petroleum pollution which was entering a "natural drainage stream" which "empties directly" into the Ottauquechee River. The migration of the material was

considered hazardous. Pursuant to Vermont Statute, the Agency gave notice that the State would investigate to determine the magnitude and extent of the petroleum pollution and take appropriate steps to minimize the harm to the public and the environment. Prior to the expenditure of State funds, the State notified plaintiff as a potentially responsible party that it could voluntarily take corrective measures under Agency direction to alleviate the pollution hazard. (Plaintiff's Exhibit 2.)

15. The State in its notice says that Marvin Wolf owns the property on which both businesses (Gerrish Motors and Scrub-A-Dub) are located. This statement is simply erroneous.

16. Although there have been other minor petroleum spills on the property over the years, the pollution giving rise to this claim is in all likelihood a result of the 1972-73 spill and the Court so finds.

17. Prior to the receipt of the State's Pollution Claim, Gerrish had no knowledge of any subsurface pollution contamination of the Woodstock East property resulting from the 1972-73 spill, and no one had asserted any claim for clean up or damages against Gerrish due to pollution contamination. Gerrish had no intention to clean up any subsurface pollution before the Agency's Pollution Claim arose.

18. On June 11, 1985, Gerrish demanded that Universal be responsible for all costs involved in monitoring and cleaning up the source of the pollution under the terms of a Universal insurance policy, No. 428584D, which had been issued to Gerrish with a policy period of September 1, 1984 to September 1, 1985. (Plaintiff's

Exhibit 2A, copy of the letter from Philip Johnson to Universal.) (Plaintiff's Exhibit 1, the Policy.)

19. Universal agreed to investigate the State's Pollution Claim under a reservation of Rights/non-waiver agreement dated June 18, 1985. (Plaintiff's Exhibit 4.)

20. Thereafter, Ground Water Technology, Inc. (GTI) was hired jointly by Aetna Insurance Co. (which provided coverage to a lessee of part of the premises) and Universal to investigate the pollution contamination.

21. Universal now maintains that it is not responsible to Gerrish under the policy for any damages for environmental clean-up incurred as a consequence of the State's Pollution Claim, and refuses to reimburse Gerrish for its expenses. (Plaintiff's Exhibits 17, 18, 19 and 20.) (See defendant's answer in this case.)

22. Pollution presently exists as a plume of petroleum product (dissolved hydrocarbons in groundwater) which is located in the subsurface strata of the Woodstock East property. It has migrated to an adjacent property of the Marble Bank as well as into the right of way for a public highway (Route 4). GTI Dec. 1988 Rprt. (Plaintiff's Exhibits 14, 14(k), 14(l) and charts.)

23. In addition to the pollution plume in the subsurface of the property, there are two areas of seepage of petroleum product into a tributary stream of the Ottauquechee River. One is near the opening of the "French Drain", which is on the north-westerly corner of the Woodstock East property. The other point of seepage is on the west side of Route 4, on property not owned by Gerrish. (Plaintiff's Exhibit 66.) At these seepage areas,

GTI has installed "collection boxes" in which both dissolved and free-phase hydrocarbons have been collected.

The Insurance Policy

24. The prototype of what Universal calls its Unicover III insurance policy, which is at issue here, was first approved by the Vermont Department of Banking and Insurance (VDBI) on May 19, 1980. Attached to the policy that was then approved was a Vermont State Amendatory Part (Edition 4-80). (Defendant's Exhibit A, pp. 289-291.)

25. Gerrish's Universal Unicover III Motor Vehicle Dealers policy was issued with the Vermont State Amendatory Part attached. (Edition 9-83.) (Plaintiff's Exhibit 1, p. 5.)

26. The pertinent coverages in the instant case are Part 500 Garage-Liability; Part 950 General Liability and Part 980 Umbrella coverage.

27. INJURY under all these Parts includes: "bodily injury, sickness, disease, or disability . . . or damage to or loss of use of tangible property."

28. The Gerrish 1984-85 Unicover III policy, (like the 1980 prototype), Part 500 Garage Coverage contained the following exclusionary language:

> Exclusions – This insurance does not apply to:
>
> . . .
>
> (m) INJURY caused by the dumping, discharge, or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental;

> (n) INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course, regardless of the nature of the discharge, release, or escape (whether accidental or not)
>
> . . . .

29. Part 950 General Liability Coverage contained the same exclusionary language, labelled (e) and (f) in that Part. The Umbrella Part 980 also included the same provisions, labelled (g) and (h).

30. The Vermont State Amendatory Part of the policy, as issued, deleted exclusions pertaining to pollution and contamination for any "AUTO insured by this policy and licensed or principally garaged in, or used for GARAGE OPERATIONS in Vermont:

> Coverage Part 500-GARAGE INSURANCE: (m) and (n)
> Coverage Part 900-BASIC AUTO INSURANCE: (g)
> Coverage Part 980-UMBRELLA: (g) and (h)."

31. The Vermont State Amendatory Part made no deletion with respect to pollution from any source other than an insured automobile, and no deletion of any kind was made of the pollution exclusionary language contained in the general liability coverage part.

32. As defendant points out, the original Unicover III specimen policy was revised numerous times by filings with the VDBI between the first filing in May, 1980 and the effective date of the Gerrish policy in September, 1984. (Defendant's Exhibits C-Q.)

None of those revisions pertained to the pollution exclusions or the Vermont State Amendatory Part.

33. In addition to the previously referenced pollution exclusions, the Gerrish policy has two exclusions in the General Liability Part 950 that are pertinent to the issue of coverage in this case:

> Exclusions – This insurance does not apply to:
> . . .
> (k) INJURY to property owned by, rented or leased to, used by, or in the care, custody or control of the INSURED . . . .
>
> (l) INJURY to premises after YOU transfer ownership or possession to another, if INJURY is caused prior to the transfer.

(Plaintiff's Exhibit 1.)

34. The Gerrish Universal policy as issued to the insured was in its pertinent parts, an "Occurrences" policy, providing coverage only for losses arising from injuries *occurring* during the policy period. (Plaintiff's Exhibit 1.)

35. Between its May 2, 1980 initial filing of its Unicover III policy and an April 1, 1985 filing which contained a certain pollution endorsement, (No 322), Universal *itself* did not make any filing with the Department which altered, amended or deleted the above-referenced exclusionary language.

Insurance Services Organization

36. Universal is a member of the Insurance Services Organization ("ISO"). ISO is an umbrella rating organization, which is owned by a number of insurance companies. ISO provides various services to its members and subscribers including drafting and filing of insurance forms with state insurance departments, which it can do on behalf of its member companies if given authority by the members to do so.

37. Universal has filed ISO Filing Authorization forms with the VDBI. The latest authorization bears the effective date of October 1, 1982 and remained effective at all times pertinent to this litigation. (Plaintiff's Exhibit 6.)

38. The ISO authorization form gives ISO express authority to act on Universal's behalf before the Department of Banking and Insurance. The authorization indicates that ISO has the authority to file "rates, rules, [and] forms" in several areas of insurance, including "general liability" insurance, with the VDBI on behalf of Universal, a "MEMBER or SUBSCRIBER of the INSURANCE SERVICES OFFICE."

39. The only exception to this authority, reserved by Universal is in the area of "personal auto" insurance. There is no exception in the ISO Authorization form filed by Universal pertaining to General liability or pollution exclusions for any states or Vermont specifically. (Plaintiff's Exhibit 6.) (Defendant's Exhibit DD.)

40. Universal's ISO Filing Authorization Form states that "[t]his Filing Authorization shall be deemed amended to the extent that any filing is made in your

office directly by the undersigned company and is inconsistent with the filing of said Insurance Services Office."

The History of the Pollution Exclusion

41. The Vermont Department of Banking and Insurance has changed its position at various times, as to whether insurance companies may exclude pollution coverage from their general liability policies.

42. From the mid 1970's through the end of 1982, the VDBI did not approve policies containing a pollution exclusion. This was merely Departmental policy; no regulation addressed this issue. Nevertheless, the Department did not "*knowingly* approve any form that contained any pollution exclusion unless a companion mandatory endorsement deleted that exclusion." (Feb. 8, 1990 letter of Paul Candage, Senior Insurance Analyst, VDBI, to Robert Manchester, Plaintiff's Exhibit 22.) During that time, form GL 01 11 (Edition 01-73) was the contamination or pollution exception endorsement used in Vermont.

43. Late in 1982, ISO filed a pollution liability policy for use by its members and subscribers, but did so on the VDBI's agreement to withdraw form GL 01 11. VDBI accepted a withdrawal of GL 01 11 as of January 1, 1983. Hence, the VDBI once again allowed pollution exclusions because it believed that separate pollution policies were available in Vermont.

44. Later in 1983, however, VDBI learned that the pollution liability policy was not widely available and therefore told ISO that VDBI intended to withdraw

approval of the pollution liability policy and to effectively reinstate form GL 01 11 pursuant to Vt. Stat. Ann. tit. 8, § 3541(c) (1984).

ISO 1984 Filing

45. Negotiations over the pollution coverage issue between ISO and the VDBI resulted in ISO's April 30, 1984 filing. This filing provided for a Vermont Pollution Liability exception Endorsement GL 01 54. (Plaintiff's Exhibit 9.) The Endorsement deleted the pollution exclusion and provided coverage for sudden and non-sudden pollution incidents on a modified claims-made basis subject to an aggregate limit.

46. Under Endorsement GL 01 54, "a claim . . . shall be deemed to have been made when written notice of such claim is received by the *insured* or by the company, whichever comes first."

47. The definition of "property damage" under the GL 01 54 Endorsement (includes, in part) "physical injury to or destruction of tangible property . . . . "

48. In addition to Endorsement GL 01 54, the April 30, 1984 ISO filing provided for two Pollution Exclusion Endorsements, GL 21 31 and GL 21 32, for cases where there was a "recognized hazard." For insureds' with recognized pollution hazards, the exclusions would totally negate pollution coverage on a "risk by risk" basis, if the insured either purchased a separate pollution liability policy or the insurer filed an Individual Risk Filing with VDBI. (Plaintiff's Exhibit 9.)

49. The April 30, 1984 filing stated that "these changes are applicable to all *policies* written on or after July 1, 1984." (Emphasis added.) (Plaintiff's Exhibit 9.)

50. After July 1, 1984, the VDBI allowed the equivalent of GL 01 54 (the ISO form) to be attached to policies issued in Vermont as long as the pollution exclusions were deleted. (Paul Candage letter to Robert Manchester, February 8, 1990, Plaintiff's Exhibit 22.)

51. At the time ISO made its April 30, 1984 filing, ISO was authorized to act as Universal's agent by virtue of the October 1, 1982 filing with VDBI.

52. The VDBI approved ISO's April 30, 1984 filing on May 2, 1984.

53. In a June 4, 1984 Circular, ISO notified all of its members that the Vermont Contamination and Pollution Endorsement GL 01 11, which previously deleted the pollution exclusion in the General Liability Policy, was withdrawn. Members were informed that a new Vermont contamination or Pollution Exception Endorsement (GL 01 54) had been developed which provided coverage for sudden and non-sudden pollution incidents on a claims-made basis subject to an aggregate limit.

54. The Circular stated that these changes were applicable to all policies written on or after July 1, 1984 and that GL 01 54 "*must* be attached to *all* policies providing general liability coverage in Vermont unless the coverage is specifically excluded." (ISO June 4, 1984 Circular, p. 2, Plaintiff's Exhibit 7.)

55. Universal received a copy of the ISO Circular on July 9, 1984. (Plaintiff's Exhibit 11.)

56. On an interoffice memorandum dated August 9, 1984, in reaction to the June 4, 1984 ISO Circular, Bob Oakes, a Universal Vice President, wrote, "we have no choice – these endorsements are MANDATORY. Also, we can't delete them or charge for the coverage without the Insured's permission . . . . How do you propose we get around this?" (Written notes between Al Birch and Bob Oakes on Plaintiff's Exhibit 11, p.7.)

57. The ISO Circular notified its members that Universal had to contact the Department before July 1, 1984 if Universal wanted to either have a different effective date or decided not to use the ISO endorsement form. Members of ISO were *not* required to file anything with the VDBI to use the new forms and effective date. Universal did not notify VDBI regarding a different effective date or any desire not to use the ISO form.

58. Universal made no contact or filing with VDBI between the time of its receipt of the ISO Circular and the time of plaintiff's receipt of the State's Pollution Claim on May 6, 1985, pertaining to pollution coverage, except for an April 1, 1985 filing.

Universal's 1985 Filing

59. On April 1, 1985, Universal submitted to the VDBI a proposed form of endorsement for its two Unicover III policies (Motor Vehicle Dealers and Automotive Parts Dealers). This filing is the first filing by Universal *itself* pertaining to pollution exclusions since the original filing of the prototype Unicover policy in May, 1980. The endorsements, Nos. 322 (Auto, Truck and Motorcycle

Dealers) and 322P (Parts Dealers) would provide coverage for "sudden and non-sudden pollution incidents on a claims-made basis."

60. The claims-made provision of Endorsement 322 would change the policy from an occurrence type policy to a claims-made policy. In other words, the "occurrence" provisions of the policy covered incidents occurring during the policy period regardless of when the claim was made. Under the new endorsement, "[a]ny claim shall be deemed to have been made when written notice of such claim is received by the INSURED or US, whichever comes first."

61. On May 12, 1986, Universal filed Endorsement No. 400 Pollution Exclusion with VDBI. This endorsement excluded pollution coverage entirely under any Universal policy to which it was attached:

> This policy shall not apply to any INJURY arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants; or to any loss costs or expense arising out of any governmental direction or request to monitor, clean up, remove, contain, treat, detoxify, or neutralize pollutants.

(Plaintiff's Exhibit 5, p. 756.) The VDBI initially disapproved Endorsement 400 on June 27, 1986, stating that VDBI "did not allow the Pollution Hazard to be routinely excluded. Pollution coverage must be *provided* unless excluded by means of an Individual Risk filing submitted to this Department *each time* it is attached to a policy." (Defendant's Exhibit S, p. 740.)

62. In response to the Department's disapproval, Universal drafted Endorsement 402, which was the same as Endorsement 400 except for the addition of a place for the insured's acknowledgement. Universal assumed that if the insured signed and Universal filed the endorsement with VDBI, such an Endorsement would meet the requirements of an Individual Risk filing. (Defendant's Exhibit S, p. 739.)

63. On September 23, 1986, the VDBI disapproved Endorsement 402 even with the space for the insured acknowledgement. The VDBI explained that it needed Universal's agreement that the endorsement would "*not* be attached to every policy, even with the insured's signature. It may be used *only* when there is a *recognized exposure* which must be described to this Department." (Defendant's Exhibit S, p. 738.)

64. On October 13, 1986, Universal explained to the VDBI that virtually all of their accounts had some "recognized pollution exposure" as most had underground fuel tanks and therefore, Universal was in a position of having to exclude coverage. (Defendant's Exhibit S, p. 742.)

65. On November 5, 1986, the VDBI approved Endorsement 402 provided that whenever the pollution hazard is excluded, an Individual Risk filing must be made with the Department. Underneath the form, Ed Mason (a Vice President of Universal) made a notation on November 13, 1986, that says "[t]his *means* we send a copy of the 402 signed by the Insured to the Vt. Insurance Dept." (Defendant's Exhibit S, p. 734.)

CONCLUSIONS OF LAW, OPINION AND ORDER

This is a declaratory judgment action in which plaintiff, Gerrish Corporation, seeks a declaration that a liability insurance policy issued by defendant, Universal Underwriters Insurance Company, provides coverage for a petroleum pollution clean-up claim asserted against plaintiff by the State of Vermont on May 2, 1985. Defendant opposes plaintiff's petition and requests a declaration that the policy does not provide coverage for plaintiff's claims.

The underlying facts are that plaintiff owned property in Woodstock, Vermont, which contained gasoline storage tanks used in connection with a retail gasoline sales operation. Certain plumbing associated with those tanks leaked petroleum products in 1972, or 1973, which petroleum has migrated since that time off plaintiff's property to at least one adjacent property. Petroleum contamination is also bleeding into a stream, which is a tributary of the Ottauquechee River.

In May of 1985, the State of Vermont through its Agency of Environmental Conservation, notified plaintiff that the Agency had determined that a petroleum product emanating from plaintiff's property is entering a natural drainage stream, which empties into the Ottauquechee River. The State also expressed its intention to investigate and mitigate the situation and seek to recover the costs from responsible parties. At the same time, the State offered plaintiff the opportunity as a potentially responsible party to take its own steps toward investigation and mitigation.

Plaintiff received the notification on May 6, 1985 and on June 11, 1985 transmitted its demand to defendant that it should take responsibility for all costs of monitoring and cleaning up the contamination under the terms of the insurance policy at issue in this case, which policy was in effect at the time the claim was made.

Defendant originally investigated the claim under a reservation of rights and eventually denied coverage altogether, claiming that the policy provided no coverage for this type of contamination because of the application of various exclusions in the policy.

Plaintiff acknowledges that the policy as issued contained certain exclusionary language, but contends that: (a) the exclusions do not apply to the injury which occurred in this case, or (b) that the exclusions have been deleted by an amendment to the policy, which was effective July 1 of 1984, or (c) that an amendment to the policy occurred in May of 1985, which provides coverage for plaintiff's claim.

This Court rejects plaintiff's contention (a) and holds that the language of the policy as issued excluded coverage. There is no need to reach plaintiff's contention (c) in view of the Court's holding with regard to contention (b), which is, that an amendment to the policy did occur on July 1st of 1984, which amendment applies to the policy which issued in September, 1984, and which provides coverage for the precise claim made by plaintiff in this case.

This Court has diversity jurisdiction over this declaratory judgment action pursuant to 28 U.S.C.A. § 1332(a)(1) (West Supp. 1990).

We will first discuss defendant's view that there are general exclusions in the policy which defeat coverage regardless of the existence or non-existence of specific pollution exclusions.

Universal contends, in part, that coverage under the policy is excluded by exclusions (l) and (k) in the general liability coverage part.

Exclusion (l) provides that there is no coverage for: "INJURY to premises after YOU transfer ownership or possession to another, if INJURY is caused prior to the transfer." In fact, although Gerrish leased to another entity at one point, it immediately leased back and has maintained ownership, possession and control of the property from which the pollution emanates throughout the time when the pollution occurred and through the time when the claim arose during the policy period. Accordingly, exclusion (l) under the General Liability Coverage Part 950 is inapplicable.

Exclusion (k) negates coverage for "INJURY to property owned by, rented or leased to, used by, or in the care, custody or control of the INSURED . . . . " Defendant urges that this exclusion applies because the contamination in this case originates on plaintiff's property and constitutes damage to that property.

Vermont law provides that policy terms in an insurance contract should be interpreted consistent with the purpose of providing coverage, therefore, limitations and exclusions should be strictly construed. *City of Burlington v. Glens Falls Ins. Co.*, 133 Vt. 423, 424, 340 A.2d 89, 90 (1975).

In this case, the "Injury" (damage to property) from pollution includes not only damage to the Gerrish property, but also includes potential damage to adjacent landowners including the Marble Bank and present damage to a stream, which runs to the Ottauquechee. We hold that the claim giving rise to this case encompasses injury to property not owned by the plaintiff. Exclusion (k) excludes injury to property owned by the insured. It might be necessary to do remedial work on the insured's property in order to stop injury to the property of others. The cost of such on premises remedial work, as well as any off premises remediation, is not excluded by the language of exclusion (k).

The State of Vermont has the authority to regulate pollution contamination of groundwater and the waterways and can recover clean-up costs. Vt. Stat. Ann. tit. 10, §§ 1283, 1390-1410 (Supp. 1990).

Defendant contends that clean-up costs or "response costs" in response to State Agency action under Title 10, Section 1283 of the Vermont Statutes are not "damages" under the policy. In the beginning of the General Liability Coverage Part, the policy states that the Insurer "will pay all sums the INSURED legally must pay as damages . . . because of INJURY." The policy also provides that Universal has a "duty to defend any suit asking for these damages." The question is whether clean-up costs constitute legal damages or are remedial and restorative and therefore only equitable in nature. This Court finds that clean-up costs constitute damages within the meaning of the policy. Legal authority on this issue is split and

there are no Vermont cases on the issue.[1] However, particularly in light of *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (1990) (New York law), this Court believes that the Vermont Supreme Court would find that pollution clean-up costs are damages under the policy in this case, and we so hold.

In *Avondale*, Avondale Industries was sued by neighboring property owners for personal injury and property damage caused by pollutants (petroleum products and chemical compounds), emanating from a dump site in Louisiana. Avondale's insurance policy had similar pollution exclusions to plaintiff's policy. Avondale was sued

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[1] Cases holding that environmental clean-up costs or response costs are covered under a general liability policy include: *Ray Indus. Inc. v. Liberty Mut. Ins. Co.*, 728 F. Supp. 1310, 1314 (E.D. Mich. 1989); *Federal Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989), *order amended by*, 738 F. Supp. 896 (M.D. Pa. 1990); *National Indem. Co. v. United States Pollution Control Inc.*, 717 F. Supp. 765, 766-67 (W.D.Okla. 1989); *Intel Corp. v. Hartford Accident and Indem. Co.*, 692 F. Supp. 1171, 1186-93 (N.D. Cal. 1988); *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359, 1365-66 (D. Del. 1987); *Township of Gloucester v. Maryland Casaulty [sic] Co.*, 668 F. Supp. 394, 398-400 (D.N.J. 1987). Cases finding clean-up or response costs are not covered damages include: *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348, 1352-54 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (Maryland law); *Cincinnati Ins. Co. v. Milliken and Co.*, 857 F.2d 979, 980-81 (4th Cir. 1988) (South Carolina law); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986) (Response costs are not property damages under CERCLA); *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 449-50 (D. Kan. 1990); *Verlan, Ltd. v. John L. Armitage & Co.*, 695 F. Supp. 950, 954-55 (N.D. Ill. 1988).

by private individuals near the dump site and received a "demand" letter from the Louisiana State Department of Environmental Quality demanding that Avondale submit a plan for remedial action at the site and informing Avondale that it was a potentially responsible party.

The Second Circuit found that the insurer was obliged to defend Avondale in private litigation and in the public administrative proceeding. The Court also held that "damages" included "remedial costs that may be imposed on Avondale by the State of Louisiana." 887 F.2d at 1207. The Court expressed concern with public interest and the prompt cleanup of the hazardous waste and mentioned a report that found that private remedial effort was quicker and less expensive than a government sponsored program. *Id.* at 1206.

Furthermore, the Vermont Supreme Court has found that in a property damage case: "[I]f the injury is temporary in the sense that restoration can cure the harm, the reasonable cost of repair may serve the need and provide adequate and fair compensation." *Bean v. Sears, Roebuck & Company*, 129 Vt. 278, 282, 276 A.2d 613, 616 (1971). *Bean* involved a suit where plaintiffs sued defendant for faulty installation of an oil furnace which resulted in pollution of the water supply on plaintiff's farm.

Under Vermont law, language in an insurance policy must be given its plain and ordinary meaning. *Kusserow v. Blue Cross-Blue Shield Plan of N.H.-Vt.*, 140 Vt. 328, 333, 437 A.2d 1114, 1117 (1981). Black's Law Dictionary (5th ed. 1979) defines "damage" as

> Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to

> another, in respect of the latter's person or property. The word is to be distinguished from its plural, "damages", which means a compensation in money for a loss or damage.

The policy defines "INJURY" as "damage to . . . tangible property." Environmental contamination is an injury or damage to tangible property and the monetary damages (clean-up costs) that flow from that property damage are recoverable as damages Gerrish legally must pay.

Even if this Court were to determine that the term "property damage" becomes ambiguous when considering environmental contamination, (which it does not), ambiguities in an insurance contract must be construed in favor of the insured. *Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 500, 536 A.2d 914, 916 (1987). ("Ambiguity in policy language should be resolved in favor of the insured since the insurer is in a far better position to avoid latent ambiguity in the text of the policy.") (citing *Town of Troy v. American Fidelity Co.*, 120 Vt. 410, 417, 143 A.2d 469, 474 (1958).

We now turn to what we have earlier called plaintiff's contention (a), that is, that the language of the policy as it was originally issued provided coverage.

The Universal policy as it issued to plaintiff effective September 1, 1984 contained exclusions attached to both the garage coverage (Part 500) and the general liability coverage (Part 950) stating that the insurance in each of those parts did not apply to:

> INJURY caused by the dumping, discharge, or escape of irritants, pollutants, or contaminants.

> This exclusion does not apply if the discharge is sudden and accidental; . . .
>
> INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course, regardless of the nature of the discharge, release, or escape (whether accidental or not) . . . .

There is a developing body of law concerning the meaning of "sudden and accidental" in this type of case (*See*, 7A J. Appelman, Insurance Law and Practice § 4499.05) (Berdal ed. 1979 & Supp. 1990). However, we need not address that issue since the exclusion barring recovery for injury caused by a discharge "into or upon any body of water or water course" applies in this instance. The very reason for this claim is the escape of a petroleum substance into a tributary of the Ottauquechee River. Accordingly, we hold that the policy as initially issued excluded coverage on that basis.

The crux of the dispute in this case, however, is whether the policy as written controls plaintiff's claim, or whether instead an amendment to the policy existed which provided coverage at the time the claim was made. To resolve this dispute, we must first look at the April 30, 1984 filing by Insurance Services Organization (ISO) to determine whether it impacts the Gerrish policy.

At the time of the April 30, 1984 filing, ISO was authorized to act as Universal's agent by the October 1, 1982 filing with VDBI. ISO had the authority to act on behalf of its member insurers under Vermont law. Vt. Stat. Ann. tit. 8, § 3541(a) (1984). ("[T]he filing required by this subsection may be made by rating organizations

on behalf of its members and subscribers; but this provision shall not be deemed to prohibit any such member or subscriber from filing any such forms on its own behalf.") (*See also* VDBI Regulation V-(D), Plaintiff's Exhibit 50, p. 2.)

The April 30, 1984 filing by ISO was applicable to policies written on or after July 1, 1984 and, quite clearly, was intended to delete any pollution exclusions and provide coverage for both sudden and non-sudden pollution incidents, in all policies to which the filing applied, on a claims-made basis. In other words, if the ISO filing applied to policies written by Universal on or after July 1, 1984, it would provide pollution coverage to any claims arising during the policy period for which the Company received a notice of claim. In this case, since the plaintiff's policy period was September 1, 1984 to September 1, 1985 and the claim arose in May of 1985, with notice given to the Company in June of 1985, pollution coverage exists if the ISO amendment is applicable to the Universal policy.

Universal contends in this litigation that the ISO filing is not applicable to its policy for the reasons that: (1) the Gerrish policy is part of what the Company characterizes as its Unicover III Program, which it maintains is independent of anything that ISO may have done and was, therefore, immune from any impact of the April 30th filing; (2) the ISO filing could not apply because the language of that filing would be ambiguous if one attempted to incorporate it into the Unicover III policy (it does not fit the "structure" of the policy); (3) it had no actual knowledge of the VDBI policy prohibiting pollution exclusions at that time and no knowledge of the ISO

filing; and (4) VDBI had no power to implement such a policy without doing so through the Administrative Procedures Act requiring notice and comment by insurers. Addressing each of defendant's arguments in order, we rule as follows.

Universal certainly could have isolated its Unicover III policy from the impact of any ISO filings by notifying the VDBI that it was doing so. In fact, VDBI Regulation 81-03, Section XII provides that:

> [A]ny insurer not electing to adopt a rating organization filing shall be considered as having adopted an independent filing on its own; and is, thereafter, individually subject to Vermont's statutory and regulatory filing requirements. Furthermore, such an insurer must *inform the Department in writing* that its filing authorization with the rating organization has been so changed.

(Plaintiff's Exhibit 50, p.10 (emphasis added).)

Also, VDBI Regulation 81-03, Section VIII provides for "Exception" filings and states that an insurer who has authorized a rating organization to file on its behalf "may submit exceptions to that filing authorization for Departmental consideration in connection with any insurance program, rule, rate(s), policy, form and/or line of insurance . . . . " (Plaintiff's Exhibit 50, p. 7.)

Further, Universal could have indicated on its ISO filing authorization form that it reserved an exception to the filing authorization covering the Unicover III policy, or the entire Unicover Program much as it did except from the authorization any coverages concerning personal auto. (Plaintiff's Exhibit 6.) Furthermore, Title 8,

Section 3451(a) of the Vermont Statutes specifically reserved the right to Universal (and all other insurers) to modify, amend, withdraw or otherwise limit the authority, which it granted to ISO. Universal did none of these things. Universal seems to contend, however, that the VDBI should have concluded that its Unicover III policy was not to be amended by ISO filings because Universal itself had historically done independent filings in connection with the Unicover policy. Universal's position would impose an obligation on the Department to somehow limit the authority of ISO on the basis of an historical practice, which the Department should have guessed at in the face of the clear written authority which existed for ISO to make filings on behalf of its members and specifically on behalf of Universal except with regard to personal auto insurance. This is simply not a sound position for the Company to take.

Universal's second contention is that the 1984 ISO filing could not apply because to do so would create ambiguities. In fact, there was no ambiguity in the *language* of the ISO filing, which stated: "On behalf of our member and subscriber companies, we hereby enclose the captioned revision. (Note there is no reservation with regard to any member.) And later "these changes are applicable to all policies written on or after July 1, 1984." (Once again, no reservation as to the policies to which coverage would apply.) Further, on a page headed "*Contamination or pollution exception* (Vermont)," the filing provides: "It is agreed that the exclusion relating to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or

pollutants is deleted." Later, on a page referring to general liability coverage, the following language appears:

> CONTAMINATION OR POLLUTANTS EXCEPTION ENDORSEMENT GL 01 54
>
> Attach Contamination or Pollution Exception Endorsement GL 01 54 to all policies issued in Vermont providing general liability coverage. This endorsement affords coverage for sudden and non-sudden pollution incidents on a claims-made basis, subject to an aggregate limit . . . . This endorsement is to be attached without charge unless written application for a charge, with the consent of the insured is made to the Commissioner pursuant to the requirements of the Vermont Statutes.

The filing and the endorsement language are clear and unambiguous and could certainly have been attached to the Universal Unicover III policy as an endorsement, which would eliminate the pollution exclusion provisions contained in the general liability part of that policy.

There *is*, however, reference in the ISO filing to amendments to provisions entitled "Coverage A-Bodily Injury Liability" and "Coverage B-Property Damage Liability". Those coverages (A and B) did not exist in the Unicover III policy at the time, suggesting to Universal that at least that part of the filing could not apply to its policy and would have been rejected by VDBI, if filed by Universal.

That may be, however, the filing was not by Universal. It was by Universal's agent "on behalf of our [ISO's] member and subscriber companies . . . " to be "applicable to all policies written on or after July 1, 1984." (Plaintiff's

Exhibit 9, ISO 1984 filing.) Universal, of course, is bound by the acts of its express agent done in furtherance of the agency. *Young v. Lamson*, 121 Vt. 474, 476, 160 A.2d 873, 875 (1960); *see also Costa v. Volkswagen of Am.*, 150 Vt. 213, 215 n.1, 551 A.2d 1196, 1197 n.1 (1988), *overruled on other grounds, Gochey v. Bombardier, Inc.*, 572 A.2d 921 (Vt. 1990); Restatement (Second) of Agency § 140 comment a (1958) ("principal is subject to liability upon a transaction conducted by [it's] agent"). Whatever ambiguities may have been created by Universal's agent certainly can not be applied to the detriment of Universal's insured. In any event with regard to the general liability section of the policy, there was no ambiguity whatsoever.

Universal also contends that the language of endorsement GL 01 54, if applicable would only delete exclusion (e) of the policy (injury caused by dumping pollutants) and not exclusion (f) of the policy (release of petroleum substances into streams). We are at a loss to determine why this should be the case. The language of the filing says that "the exclusion relating to the discharge . . . of liquids or gases, . . . contaminants or pollutants is deleted." The endorsement applies with equal impact to both exclusions.

Universal's third argument is that it had no knowledge of the VDBI policy, which during the time period from July 1, 1984 until the present, required pollution coverage in all policies either by deleting exclusions, or attaching the equivalent of the ISO form GL 01 54 providing pollution coverage on a modified claims-made basis except in individual risk or "risk by risk" situations. (Plaintiff's Exhibit 22.) Universal also contends that it had no knowledge of the ISO April 30, 1984 filing.

In fact, it is abundantly clear that *ISO* was well aware of the VDBI policy regarding pollution exclusions. In fact, during the late 1983 and early 1984 time period, ISO engaged in extensive negotiations with VDBI over that very issue, ultimately resulting in the April 30, 1984 filing. For purposes of dealing with VDBI, ISO had an agency relationship with Universal. Accordingly, even if Universal had no actual knowledge of the Department policy, it is charged with constructive knowledge of the information, which was known to ISO. *See Estate of Sawyer v. Crowell*, 151 Vt. 287, 291, 559 A.2d 687, 690 (1989); *Solomon v. Design Dev., Inc.*, 143 Vt. 128, 131, 465 A.2d 234, 236 (1983).

Any contention that Universal was unaware of the ISO action has even less merit. Plaintiff's exhibit 11 is a circular dated June 28, 1984 sent by ISO to Universal clearly disclosing the filing and all of its particulars along with various Universal documents reacting to the information. The circular

> announced the approval of Vermont contamination or pollution exception endorsement GL 01 54. This endorsement provides coverage for sudden and non-sudden pollution incidents on a claims-made basis subject to an aggregate limit.

The circular also indicates "that these changes were applicable to *all* [emphasis added] policies written on or after *July 1, 1984.*" It goes on to state that:

> If you have authorized us to file on your behalf and decide:
>
> . . .

> *not* to use this revision, you should notify the Vermont Insurance Department prior to our effective date [which is July 1, 1984].

An inter-office memorandum from Ed Mason (Vice President of Universal) dated August 9, 1984 notifies Bob Oakes (another Universal Vice President) that:

> [a]s I read this they [referring to ISO] are requiring an endorsement providing coverage for "sudden and non-sudden pollution incidents on a claims-made basis subject to an aggregate limit."

(Plaintiff's Exhibit 11, p. 7.) Al Birch of Universal, in a handwritten note to Bob Oakes and Ed Mason on the same memorandum, expressed his wish not to convert to claims-made coverage because "[i]t would be inconsistent with GL & represents some negative future implications." Mr. Oakes' handwritten reply was: "Al – we have no choice – these endorsements are MANDATORY. Also, we can't delete them or charge for the coverage without the insured's permission. We're even required to write it on a claims first made basis. How do you propose to get around this?"

Despite the circular, Universal did not "notify the Vermont Insurance Department prior to [or after the] effective date that it had decided not to use the revision". This Court holds that the provisions of the April, 1984 ISO filing and specifically endorsement GL 01 54 became a part of all Universal policies issued in Vermont after July 1, 1984 until June 21, 1985, when Universal's Unicover III Endorsement 322 was approved by VDBI.

The coverage provided by the April 30, 1984 filing became a part of the coverage provided to Gerrish even though the language was not included in the policy as issued by virtue of Title 8, Section 3541 of the Vermont Statutes and the CONFORMING TO LAW provision of the policy. Section 3541 prohibits issuance of a policy in Vermont, until the form has been approved by the Commissioner. Upon approval, the ISO endorsement deleted the pollution exclusion language in Universal's General Liability coverage. In order to conform to law then, the policy provided coverage by deletion of the exclusions. As a matter of law, Universal was required to provide the coverage once the ISO filing had been approved as to all general liability policies issued in Vermont after July 1, 1984.

Defendant also contends that any obligation, which it might have to provide pollution coverage in this case, arose as a result of an unauthorized or *ultra vires* policy of the Vermont Department of Banking and Insurance. Universal contends that VDBI had no authority under the statutory scheme existing in Vermont, to impose a departmental policy such as existed in this case, namely, that at various periods of time the VDBI would not approve policies which did not provide pollution coverage, or which excluded such coverage in all instances. Since the Department did not go through the procedures set out in the Vermont Administrative Procedures Act for the adoption of Regulations, it is contended that no authority existed. This position on the part of Universal ignores the natural impact of the authority the Department *did* have under Title 8, Section 3541 of the Vermont Statutes, which gives the Commissioner of Banking and Insurance the

authority to either approve, or disapprove forms of coverage which are to be sold to insureds in the State of Vermont. If the Department decides as a matter of policy that it will not approve certain types of coverage, or exclusions (for example policies containing pollution exclusions), it need not wait for filings and reject them on a policy by policy basis. As a practical matter, the sensible approach, and the approach that the Department took in this case, was to let it be known what it intended to do with regard to filings pertaining to pollution coverage so that the insurance industry could react and negotiate with the Department as to the type of form which would be approved for use in Vermont.

In any event, the argument that this action was *ultra vires* is of no avail to defendant in this case. Universal's agent (ISO) voluntarily negotiated with the Department and ultimately decided to file endorsement GL 54 01, which provided pollution coverage in general liability policies. Since ISO chose to take that approach and Universal is bound by ISO's actions on its behalf, Universal's suggestion that the Department acted outside of its authority is of no avail. A challenge to the Department's authority was available to defendant, or to ISO, prior to ISO's filing. In fact, a statutory hearing process was available for that purpose, but not at this late date.[2]

Having determined that ISO's April, 1984 filing provided pollution coverage to plaintiff, it is not necessary for the Court to rule on plaintiff's argument that Universal's 1985 amendment to the Unicover III policy provides

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[2] Vt. Stat. Ann. tit. 8, §§ 3541(b), (c) (1984)

coverage for this claim. Therefore, we make no ruling in that regard.

On the basis of the foregoing opinion, the Court issues the following ORDER:

The language of endorsement GL 01 54 is incorporated into the general liability section of Universal Underwriters Insurance Company policy number 428584D issued to the plaintiff Gerrish Corporation. The provisions of that endorsement afford coverage under the policy for the claim made by plaintjff in June of 1985 in response to the Vermont Agency of Environmental Conversation [sic] communication to Kirk Gerrish dated May 2, 1985. The property damage coverage referred to in endorsement GL 01 54 and the "INJURY" to property provisions in the general liability insurance coverage part of the Universal policy cover the clean-up costs asserted by the Vermont Agency of Environmental Conservation as well as the costs of investigation and defense of that claim. Any environmental harm to the State's waterways, which has arisen, or may arise out of this claim, constitute "damage to or loss of use of tangible property" under the policy. Coverage is provided for Gerrish under both the general liability part 950 and the umbrella part 980 of the Universal policy.

Dated at Burlington in the District of Vermont, this 4th day of December, 1990.

/s/ Fred I. Parker
Fred I. Parker
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GERRISH CORPORATION, *et al*, Woodstock East Woodstock, Vermont Plaintiff v. Universal Underwriters Insurance Company Kansas City, Missouri Defendant.	:	Civil Action File No. 89-19 (Filed Dec. 7, 1990) (Received Dec. 11, 1990)

ERRATA ON OPINION AND ORDER
FILED DECEMBER 5, 1990

Page 34, line 8 – delete "Conversation" and insert "Conservation" in place thereof.

Dated at Burlington in the District of Vermont, this 7th day of December, 1990.

/s/ Fred I. Parker
District Judge

United States District Court

_____ DISTRICT OF VERMONT

GERRISH CORPORATION, et al
Woodstock East
Woodstock, Vermont

V.

UNIVERSAL UNDERWRITERS INSURANCE CO.,
Kansas City, Missouri

JUDGMENT IN A CIVIL CASE

(Filed Dec. 6, 1990)

(Received Dec. 7, 1990)

CASE NUMBER: 89-19

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The language of endorsement GL 01 54 is incorporated into the general liability section of Universal Underwriters Insurance Company policy number 428584D issued to the plaintiff Gerrish Corporation. The provisions of that endorsement afford coverage under the policy for the claim made by plaintiff in June of 1985 in response to the Vermont Agency of Environmental Conservation communication to Kirk Gerrish dated May 2, 1985. The property damage coverage referred to in endorsement GL 01 54 and the "INJURY" to property provisions in the general liability insurance coverage part of the Universal

policy cover the clean-up costs asserted by the Vermont Agency of Environmental Conservation as well as the costs of investigation and defense of that claim. Any environmental harm to the State's waterways, which has arisen, or may arise out of this claim, constitute "damage to or loss of use of tangible property" under the policy. Coverage is provided for Gerrish under both the general liability part 950 and the umbrella part 980 of the Universal policy.

December 6, 1990
Date

RICHARD PAUL WASKO
Clerk

/s/ illegible
(By) Deputy Clerk

United States Court of Appeals

FOR THE

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November one thousand nine hundred and ninety-one.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,
HON. JOSEPH M. MCLAUGHLIN,
Circuit Judges,

GERRISH CORPORATION, doing business as Gerrish Motors, doing business as Scrub-a-Dub, Plaintiff-Appellee, V UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Defendant-Appellant.	Docket No. 91-7008 (Received Dec. 5, 1991) (Filed Nov. 29, 1991)

A petition for a rehearing having been filed herein by Defendant-Appellant, Universal Underwriters Insurance Company.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

Supreme Court of the United States

No.

A-602

Gerrish Corporation, doing business as
Gerrish Motors, doing business as
Scrub-a-Dub,

Petitioner

v.

Universal Underwriters Insurance Company

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and included March 29, 1992.

/s/ Clarence Thomas
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of February, 1992.

§ 10. [Powers denied the several states]

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

AMENDMENT V. **[Criminal indictment; double jeopardy; self incrimination; due process; compensation for taking private property]**

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. [Citizens; privileges and immunities; due process; equal protection]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. [Representatives apportioned]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. [Rebellion disqualifies from office; removal of disability]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. [Public debt; debts and claims incurred in aid of rebellion]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. [Enforcement powers]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Vermont Statutes Annotated, Title 3, Section 801.

§ 801. Short title and definitions

(a) This chapter may be cited as the "Vermont Administrative Procedure Act."

(b) As used in this chapter:

(1) "agency" means a state board, commission, department, agency, or other entity or officer of state government, other than the legislature, the courts, the Commander in Chief and the Military Department, authorized by law to make rules or to determine contested cases;

(2) "contested case" means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;

(3) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;

(4) "licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;

(6) "person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency;

A. I don't believe it was in stopping right there. It was asked in a variety of ways where other things after that were asked.

Q. We'll talk about those variety of ways in just a second, Doctor, but as far as that particular question, would you agree with me that is a pretty simple question [p. 1254] pretty simple, straightforward question, isn't it, Doctor?

A. Your question?

Q. Yes.

A. Yes, it is pretty simple, I would say.

Q. But you didn't ask that, did you?

A. There were a lot of questions we didn't ask. We could go on in finitum. The people spent almost an hour filling out questionnaires with lots of different questions.

Q. I'm not a social scientist, Doctor, but it seems to me if you want to find out what the average person in our community thinks about that film, whether it is acceptable or not, you simply ask them –

MR. KLEIN: Your Honor, I object to him making a speech. If he wants to ask a question, let him ask a question instead of making a speech to the jury.

THE COURT: I think we need to ask a question if you have one.

Q. Do you think that would be an appropriate question to ask these people in light of what you know these jurors have to decide in this case, Doctor?

veterans' memorial cemetery advisory board and for the fish and wildlife board, the chairman or executive secretary of the board shall be the adopting authority. The secretary of state shall be the adopting authority for the office of professional regulation.

(12) "small business" means a business employing no more than twenty full-time employees.

Vermont Statutes Annotated, Title 3, Section 814.

§ 814. Licenses

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases shall apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire, until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements

for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

(d) An agency having jurisdiction to conduct proceedings and impose sanctions in connection with conduct occurring during the time a license is operative shall not lose jurisdiction if the license is not renewed or is surrendered or otherwise terminated prior to initiation of such proceedings.

Vermont Statutes Annotated, Title 3, Section 831.

§ 831. Required policy statements and rules

(a) Where due process or a statute directs or permits an agency to adopt rules, regulations or both, unless that statute expressly provides to the contrary, it shall be construed as requiring or permitting the agency to adopt rules in the manner provided in this chapter.

(b) An agency shall adopt a procedure describing an existing practice when so requested by an interested person.

(c) An agency shall initiate rulemaking to adopt as a rule an existing practice or procedure when so requested by 25 or more persons or by the legislative committee on administrative rules.

(d) An agency required to hold hearings on contested cases as required by section 809 of this title shall

Q. I understand, but is it or is it not an entirely different question than the question I am asking?

A. If you want is it acceptable to them, we didn't ask that. We asked if it was acceptable to them for other people to obtain and view it.

Q. Is it the whole purpose of the survey to find out whether this material is accepted or not accepted in this community?

A. That's correct.

Q. Isn't the easiest way to do is ask if it is accepted or not accepted to them, them being the community?

A. We are doing that, but we are doing that, number one, by asking this question and then by showing them the material and asking them once again to determine based on viewing the material.

Q. Let's look at the question, number nineteen. Is that the first one that you say is applicable to your ultimate conclusion concerning this particular film?

A. Yes, it is.

Q. How does that question read, Doctor?

A. "Is it or is it not acceptable to you for adults in your community to obtain and view such videos and [p. 1262] magazines if they should want to?"

Q. That is a question of toleration, isn't it, Doctor?

A. No, in my opinion it is a question of acceptability.

(c) Sections 831(b) and (c) of this title do not require the attorney general to adopt procedures or rules describing the content of opinions or other legal advice given to agencies.

(d) Notwithstanding sections 831(b) and (c), when an agency receives a request to adopt a procedure or rule, it may elect to issue a declaratory ruling when it has in effect a procedure or rule, as requested, which disposes of the question presented.

Vermont Statutes Annotated, Title 3, Section 835.

§ 835. Compilation of procedures

Procedures shall be maintained by the agency in an official current compilation that is indexed by subject. Each addition, change or deletion to the official compilation shall also be dated, indexed and recorded. The compilation shall be a public record.

Vermont Statutes Annotated, Title 3, Section 836.

§ 836. Procedure for adoption of rules

Except for emergency rules, rules shall be adopted by taking the following steps:

(1) prefiling, when required;

(2) filing proposed rule;

(3) publishing proposed rule;

(4) holding public hearing and receiving comments;

(5) filing final proposal;

(6) responding to legislative committee on administrative rules when required; and

(7) filing adopted rule.

Vermont Statutes Annotated, Title 3, Section 837.

§ 837. Prefiling

Except for emergency rules, a rule shall be prefiled with the inter-agency committee on administrative rules fifteen days before filing under section 838 of this title if the governor has required by current executive order that:

(1) all rules from that agency shall be prefiled; or

(2) all rules concerning the subject matter of the proposed rule shall be prefiled.

Vermont Statutes Annotated, Title 3, Section 838.

§ 838. Filing of proposed rules

(a) Proposed rules shall be filed with the secretary of state. The filing shall include the following:

(1) a cover sheet;

(2) an economic impact statement;

(3) an incorporation by reference statement, if the proposed rule includes an incorporation by reference;

(4) an adopting page;

(5) the text of the proposed rule; and

(6) an annotated text showing changes from existing rules.

(b) The cover sheet shall be on a form prepared by the secretary of state containing at least the following information:

(1) the name of the agency;

(2) the title or subject of the rule;

(3) a concise summary explaining the effect of the rule;

(4) the statutory authority for the rule;

(5) an explanation of why the rule is necessary;

(6) an explanation of the people, enterprises and government entities affected by the rule;

(7) a brief summary of the economic impact of the rule;

(8) the name, address and telephone number of an individual in the agency able to answer questions and receive comments on the proposal;

(9) a proposed schedule for completing the requirements of this chapter, including, if there is a hearing scheduled, the date, time and place of that hearing, and a deadline for receiving comments; and

(10) a signed and dated statement by the adopting authority approving the contents of the filing.

(c) The economic impact statement shall analyze the anticipated costs and benefits to be expected from adoption of the rule. Specifically, each economic impact statement shall, for each requirement in the rule:

(1) list categories of people, enterprises and government entities potentially affected and estimate for each the costs and benefits anticipated;

(2) compare the economic impact of the rule with the economic impact of other alternatives to the rule, including no rule on the subject or a rule having separate requirements for small business;

(3) include a flexibility statement. The flexibility statement shall compare the burden imposed on small businesses by compliance with the rule to the burden which would be imposed by alternatives considered under section 832a of this title.

In addition, each economic impact statement shall conclude that the rule is the most appropriate method of achieving the regulatory purpose and, with respect to small businesses, contain any findings required by section 832a of this title. Only employees of the agency and information either already available to the agency or available at reasonable cost shall be used in preparing economic impact statements.

(d) Any required incorporation by reference statement shall include a separately signed statement by the adopting authority:

(1) certifying that the text of the matter incorporated has been reviewed by the agency, with the name of the reviewing official;

(2) explaining how the text of the matter incorporated can be obtained by the public, and at what cost;

(3) explaining any modifications to the matter incorporated;

(4) discussing the comparative desirability of reproducing the incorporated matter in full in the text of the rule; and

(5) certifying that the agency has the capability and the intent to enforce the rule.

(e) The adopting page shall be on a form prepared by the secretary of state and shall contain the name of the agency, the subject of the proposed rule, an explanation of the effect of the proposal on existing rules and any internal reference number assigned by the agency.

(f) The annotated text of the rule shall include markings to clearly indicate changed wording from any existing rule.

Vermont Statutes Annotated, Title 3, Section 839.

§ 839. Publication of proposed rules

(a) Upon receiving a proposed rule, the secretary of state shall arrange for two formal publications of information relating to the proposal.

(b) The first formal publication of a proposed rule shall include the following information from the cover sheet:

(1) the name of the agency;

(2) the title or subject of the rule;

(3) a concise summary of the effect of the rule;

(4) an explanation of the people, enterprises and governmental entities affected by the rule;

(5) a brief summary of economic impact;

(6) the name, telephone number and address of an agency official able to answer questions and receive comments on the proposals;

(7) the date, time and place of the hearing or hearings; and

(8) the deadline for receiving comments.

(c) The second formal publication of a proposed rule shall include the following information from the sheet:

(1) the name of the agency;

(2) the title and subject of the rule; and

(3) the name, telephone number and address of an agency official able to answer questions and receive comments on the proposed rule.

(d) Formal publications shall be made on Thursdays in a consolidated advertisement in the newspapers of record. Annually on or before July 1, the secretary of state shall approve a number of newspapers having general circulation in different parts of the state as newspapers of record under this chapter.

(e) In addition to formal publication, the secretary of state shall also arrange for publication of an abbreviated notice of proposed rules on a weekly basis in selected newspapers in the state. These notices shall contain the subject of recently proposed rules, together with a brief statement by the secretary of state explaining where to write or telephone for more information on the rules.

(f) The secretary of state may edit all advertisements for clarity, brevity and format and shall include a

brief statement explaining how members of the public can participate in the rulemaking process.

(g) The secretary of state shall be reimbursed by agencies making publication so that all costs are prorated among agencies publishing at the same time.

Vermont Statutes Annotated, Title 3, Section 840.

§ 840. Public hearing and comment

(a) The agency may hold one or more public hearings for each proposed rule. A public hearing shall be scheduled if so requested by 25 persons, by a governmental subdivision or agency, or by an association having 25 or more members. The first hearing shall not be held sooner than 10 days following the second formal publication.

(b) On request, the agency shall promptly provide a copy of a proposed or final proposed rule. If the copy is mailed, it shall be sent not later than the end of the third working day after the request is received. The agency may charge for copying costs in the amount provided by law.

(c) An agency shall afford all persons reasonable opportunity to submit data, views or arguments, orally or in writing, in accordance with the terms of the notice given under section 839 of this title, but at least through the seventh day following the last public hearing.

(d) The agency shall consider fully all written and oral submissions concerning the proposed rule, and all submissions on separate requirements for small businesses.

(e) If requested by an interested person at any time before 30 days after final adoption of a rule, the adopting authority shall issue an explanation of the proposed rule. The explanation shall include:

(1) a concise statement of the principal reasons for and against the adoption of the rule in its final form; and

(2) an explanation of why the adopting authority overruled the arguments and considerations against the rule.

Vermont Statutes Annotated, Title 3, Section 841.

§ 841. Final proposal

(a) After considering public comment as required in section 840 of this title, an agency shall file a final proposal with the secretary of state and with the legislative committee on administrative rules.

(b) The filing of the final proposal shall include all information required to be filed with the original proposal, suitably amended to reflect any changes made in the rule and the fact that public hearing and comment has been completed. Where an agency decides in a final proposal to overrule substantial arguments and considerations raised for or against the original proposal or to reject suggestions with respect to separate requirements for small businesses, the final proposal shall include a description of the reasons for the agency's decision.

(c) The legislative committee on administrative rules shall distribute copies of final proposed rules to the

chairs of the appropriate standing committees. In addition, each member of the appropriate standing committees shall be notified that the final proposed rule has been filed, the date of filing and, upon request, shall be provided with a copy of the filing.

Vermont Statutes Annotated, Title 3, Section 842.

§ 842. Review by legislative committee

(a) Within 30 days of the filing of a final proposal, the legislative committee on administrative rules, by majority vote of the entire committee, may object under subsections (b), (c) or (d) of this section and recommend that the agency amend or withdraw the proposal. The agency shall be notified promptly of the objections. Failure to give timely notice shall be deemed approval. The agency shall within 14 days of receiving notice respond in writing to the committee. After receipt of this response the committee may withdraw or modify its objections.

(b) The committee may object under this subsection if a proposed rule is:

(1) beyond the authority of the agency;

(2) contrary to the intent of the legislature; or

(3) arbitrary.

When objection is made under this subsection, and the objection is not withdrawn after the agency responds, on majority vote of the entire committee, it may file the objection in certified form with the secretary of state. The objection shall contain a concise statement of the committee's reasons for its action. The secretary shall affix to each objection a certification of its filing and as soon as

practicable transmit a copy to the agency. After a committee objection is filed with the secretary under this subsection, or on the same grounds under section 817(d) of this title, to the extent that the objection covers a rule or portion of a rule, the burden of proof thereafter shall be on the agency in any action for judicial review or for enforcement of the rule to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the legislature and is not arbitrary. If the agency fails to meet its burden of proof, the court shall declare the whole or portion of the rule objected to invalid. The failure of the committee to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness.

(c) The committee may object under this subsection if a proposed rule is not written in a satisfactory style according to section 833 of this title.

(d) The committee may object under this subsection if the economic impact statement fails to recognize a substantial economic impact of the proposed rule that the committee describes in its notice of objection.

The committee may object one time under this subsection and return the proposed rule to the agency as unacceptable for filing. The agency may then cure the defect and adopt the rule, or it may adopt the rule without change.

(e) When an objection is made under subsection (b) of this section and has been certified by the secretary of state, notice of the objection shall be included on all copies of the rule distributed to the public.

Vermont Statutes Annotated, Title 3, Section 843.

§ 843. Filing of adopted rules

(a) An adopting authority may adopt a properly filed final proposed rule after:

(1) The passage of 30 days from filing of a final proposal under section 841 of this title without receiving notice of objection from the legislative committee on administrative rules; or

(2) Receiving notice of approval from the legislative committee on administrative rules; or

(3) Responding to an objection of the legislative committee on administrative rules under section 842 of this title.

(b) The text of the adopted rule shall be the same as the text of the final proposed rule submitted under section 841, except that any germane change may be made by the agency in response to an objection or expressed concern of the legislative committee on administrative rules.

(c) Adoption shall be complete upon proper filing with the secretary of state and with the legislative committee on administrative rules. An agency shall have eight months from the date of initial filing with the secretary of state to adopt a rule unless extended by action or request of the legislative committee on administrative rules. The secretary of state shall refuse to accept a final filing after that date.

(d) Adopted rules filed shall include:

(1) A cover sheet on a form prepared by the secretary of state containing at least the following information:

(A) the name of the agency;

(B) the title or subject of the rule;

(C) a brief summary of any changes made since the filing of the final proposed rule, including any changes in expected economic impact;

(D) a summary of the dates on which the agency complied with the procedural requirements of this chapter; and

(E) a signed and dated statement by the adopting authority that the procedural requirements of this chapter have been met and that the adopting authority approves of the contents of the filing; and

(2) An adopting page as required by section 838 of this title; and

(3) The text of the rule.

(e) After adopting a rule, the agency shall create a file containing all papers used or created in that action. The file shall be retained for at least one year.

Vermont Statutes Annotated, Title 3, Section 844.

§ 844. Emergency rules

(a) Where an agency believes that there exists an imminent peril to public health, safety or welfare, it may

adopt an emergency rule. The rule may be adopted without having been prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to ensure that emergency rules are known to persons who may be affected by them.

(b) Emergency rules adopted under this section shall not remain in effect for more than 120 days. An agency may propose a permanent rule on the same subject at the same time that it adopts an emergency rule.

(c) Emergency rules adopted under this section shall be filed with the secretary of state and with the legislative committee on administrative rules. The legislative committee on administrative rules shall distribute copies of emergency rules to the appropriate standing committees.

(d) Emergency rules adopted under this section shall include:

(1) as much of the information required for the filing of a proposed rule as is practicable under the circumstances; and

(2) a signed and dated statement by the adopting authority explaining the nature of the imminent peril to the public health, safety or welfare and approving of the contents of the rules.

Vermont Statutes Annotated, Title 3, Section 845.

§ 845. Effect of rules

(a) Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or

revised or unless a court of competent jurisdiction determines otherwise. Except as provided by section 842(b) of this title, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

(b) No agency shall grant routine waivers of or variances from any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

(c) Nothing in this chapter:

(1) allows rules to provide for penalties, fines or imprisonment not authorized by other law;

(2) enlarges the authority of any agency to impose requirements on any member of the public; or

(3) allows an agency by rule to require permits or licenses unless specifically authorized by other law.

(d) Rules adopted under this chapter shall take effect 15 days after adoption is complete or at a later time provided in the text of the rule or on its adopting page. However, an emergency rule shall take effect upon filing, or at a later time provided in the text of the rule or on its adopting page.

(e) Rules shall remain in effect until:

(1) repealed or modified by subsequent rule;

(2) limited or invalidated by a court; or

(3) repealed or modified by statute.

Vermont Statutes Annotated, Title 3, Section 846.

§ 846. Remedies for procedural failures

(a) The following shall prevent a rule from taking effect:

(1) failure to file with the secretary of state; or

(2) failure to file with the legislative committee on administrative rules; or

(3) failure to make a required filing with the interagency committee on administrative rules; or

(4) failure to respond to an objection of the legislative committee on administrative rules.

(b) The following shall not affect the validity of a rule after its adoption:

(1) inadvertent failure to make required assurances relating to an incorporation by reference; or

(2) amendment after public hearing of the text of a proposed rule in a manner that does not cause the published summary of the rule to become misleading or inadequate; or

(3) failure to certify that all procedures required by this chapter have been satisfied; or

(4) failure to meet the style requirements of section 833 of this title; or

(5) inadvertent failure to mail notice or copies of any rule.

(c) For other violations of this chapter, the court may fashion appropriate relief.

(d) An action to contest the validity of a rule for noncompliance with any of the provisions of this chapter other than those listed in subsection (a) of this section must be commenced within one year after the effective date of the rule.

Vermont Statutes Annotated, Title 3, Section 847.

§ 847. Availability of adopted rules; rules by secretary of state

(a) The secretary of state shall keep open to public inspection a permanent register of rules.

(b) The secretary of state shall publish not less than quarterly a bulletin setting forth the text of all rules filed since the immediately preceding publication and any objections filed under section 842(b) of this title.

(c) The bulletin may omit any rule if either:

(1) A commercial publisher offers a comparable publication at a competitive price; or

(2) All three of the following apply:

(A) its publication would be unduly cumbersome or expensive; and

(B) the rule is made available on application to the adopting agency; and

(C) the bulletin contains a notice stating the general subject matter of the omitted rule and stating how a copy of the rule and any objection filed under section 842(b) may be obtained.

(d) Bulletins shall be made available upon request to agencies and officials of this state free of charge and to other persons at prices fixed by the secretary of state to cover mailing and publications costs.

(e) The secretary of state shall adopt rules for the effective administration of this chapter. These rules shall be applicable to every agency and shall include but not be limited to uniform procedural requirements, style, appropriate forms and a system for compiling and indexing rules.

Vermont Statutes Annotated, Title 3, Section 848.

§ 848. Rules repeal; operation of law

(a) A rule shall be repealed without formal proceedings under this chapter if:

(1) the agency which adopted the rule is abolished and its authority, specifically including its authority to implement its existing rules, has not been transferred to another agency, or

(2) a court of competent jurisdiction has declared the rule to be invalid, or

(3) the statutory authority for the rule, as stated by the agency under section 838(b)(4) of this title, is repealed by the general assembly or declared invalid by a court of competent jurisdiction.

(b) When a rule is repealed by operation of law under this section the secretary of state shall delete the rule from the published code of administrative rules.

(c) If the statutory authority for a rule, as stated by the agency under section 838(b)(4), is amended by the general assembly, the agency shall review the rule and make a determination whether such statutory amendment repeals the authority upon which the rule is based, and shall, within 60 days of the effective date of the statutory amendment, inform in writing the secretary of state and the legislative committee on administrative rules whether repeal or revision of the rule is required by the statutory amendment.

Vermont Statutes Annotated, Title 8, Section 3541.

§ 3541. Filing and approval of forms

(a) No basic insurance policy, certificate or annuity contract form, or application form where written application is required and is to be made a part of the policy or contract, or printed rider of endorsement form or form of renewal certificate, shall be delivered, or issued for delivery in this state, unless the form has been filed with and approved by the commissioner. This provision shall not apply to surety bonds, or to specially rated inland marine risks, nor to policies, riders, endorsements, or forms of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or disability insurance policies and are used at the request of the individual policyholder, contract holder, or certificate holder. All certificates delivered or issued for delivery in this state shall be filed with the commissioner for approval if the group policy does not qualify under subdivision 3368(a)(4) of this title at the time of delivery or issuance. As to forms for use in property, marine (other than wet marine and transportation insurance), casualty and surety insurance coverages the filing required by this subsection may be made by rating organizations on behalf of its members and subscribers; but this provision shall not be deemed to prohibit any such member or subscriber from filing any such forms on its own behalf.

(b) Every such filing shall be made not less than thirty days in advance of any such delivery. At the expiration of such thirty days the form so filed shall be

deemed approved unless prior thereto it has been affirmatively approved or disapproved by order of the commissioner. Approval of any such form by the commissioner shall constitute a waiver of any unexpired portion of such waiting period. The commissioner may extend by not more than an additional thirty days the period within which he may so affirmatively approve or disapprove any such form, by giving notice to the insurer of such extension before expiration of the initial thirty day period. At the expiration of any such period as so extended, and in the absence of such prior affirmative approval or disapproval, any such form shall be deemed approved. The commissioner may at any time, after notice and for cause shown, withdraw any such approval. In any notice of disapproval, or withdrawal of a previously approved form, the commissioner shall state that a hearing will be granted within twenty days upon request of the insurer.

(c) Any order of the commissioner disapproving any such form or withdrawing a previous approval shall state the grounds therefor and the particulars thereof in such detail as reasonably to inform the insurer thereof. Any such withdrawal of a previously approved form shall be effective at expiration of such period, not less than thirty days after the giving of notice of withdrawal, as the commissioner shall in such notice prescribe. Any demand for a hearing relative to the commissioner's withdrawal of approval of a form which has been received by the commissioner prior to the effective date of such withdrawal shall stay such action pending the hearing thereon.

(d) The commissioner may, by order, exempt from the requirements of this section for so long as he deems proper any insurance document or form or type thereof as specified in such order, to which, in his opinion, this section may not practicably be applied, or the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public.

(e) Appeals from orders of the commissioner disapproving any such form or withdrawing a previous approval may be taken as provided in sections 4660 and 4661 of this title.

(f) Each filing of a policy, contract, endorsement, rider, certificate, or application form shall be accompanied by payment to the commissioner of a nonrefundable fee of $20.00, per filing submission. A minimum fee of $100.00 shall accompany each such filing if submitted by a rating, advisory or service organization.

Vermont Statutes Annotated, Title 8, Section 3542.

§ 3542. Grounds for disapproval

The commissioner shall disapprove any form filed under this subchapter or withdraw any previous approval thereof, only on one or more of the following grounds:

(1) If it is in any respect in violation of or does not comply with this act.

(2) If it contains or incorporates by reference, where such incorporation is otherwise permissible, any inconsistent, ambiguous or misleading clauses, or exceptions

and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

(3) If it has any title, heading, or other indication of its provisions which is misleading.

(4) If it is printed or otherwise reproduced in such manner as to render any provision of the form substantially illegible.

Vermont Statutes Annotated, Title 8, Section 4201.

§ 4201. Filing and approval of policies; review

A policy of insurance covering against loss or damage resulting from accident to, or injury suffered by an employee or other person, and for which the insured is liable, shall not be issued or delivered to a person, firm or corporation resident of, or doing business in this state, until a copy of the form thereof has been filed with the commissioner; and it shall not be issued or delivered unless approved by him. If he adjudges that such form does not comply with the requirements of law, he shall forthwith give written notice to the insurer who filed such form, specifying the reasons for his action, and it shall be unlawful thereafter for such insurer to issue a policy in such form. The action of the commissioner in this regard shall be subject to review by writ of certiorari.

§ 4201a. Filing fees

Each filing of a policy or contract form or document, submitted pursuant to section 4201 of this title, shall be

accompanied by payment to the commissioner of a nonrefundable fee of $20.00 per filing submission.

Vermont Statutes Annotated, Title 8, Section 4202.

§ 4202. Form and contents of policy

Such policy shall not be so issued or delivered:

(1) Unless every printed portion thereof and any endorsement or attached papers shall be plainly printed;

(2) Unless a brief description thereof is plainly printed on the first page; and

(3) Unless the exceptions of the policy are printed with the same prominence as the benefits to which they apply.

Vermont Statutes Annotated, Title 8, Section 4203.

§ 4203. Required conditions

Each policy so issued and delivered shall contain in substance the following conditions:

(1) The company shall pay and satisfy any judgment that may be recovered against the insured upon any claim covered by this policy to the extent and within the limits of liability assumed thereby, and shall protect the insured against the levy of any execution issued upon any such judicial judgment or claim against the insured. No limitation of liability in this policy shall be valid if, after a judgment has been rendered against the insured in

respect to this legal liability for damages in a particular instance, the company continues the litigation by an appeal or otherwise, unless the insured shall stipulate with the company, agreeing to continue such litigation;

(2) No action shall lie against the company to recover for any loss under this policy, unless brought within one year after the amount of such loss is made certain either by judgment against the insured after final determination of the litigation or by agreement between the parties with the written consent of the company;

(3) The insolvency or bankruptcy of the insured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and in case of such insolvency or bankruptcy an action may be maintained by the injured person or claimant against the company under the terms of the policy, for the amount of any judgment obtained against the insured not exceeding the limits of the policy; and

(4) Payment of any judicial judgment or claim by the insured for any of the company's liability hereunder shall not bar the insured from any action or right of action against the company. In case of payment of loss or expense under this policy, the company shall be subrogated to all rights of the insured against any party, as respects such loss or expense, to the amount of such payment, and the insured shall execute all papers required and shall cooperate with the company to secure to the company such rights.

Vermont Statutes Annotated, Title 8, Section 4203.

§ 4203. Required conditions

Each policy so issued and delivered shall contain in substance the following conditions:

* * *

(5) Policies of motor vehicle insurance shall not provide for any adjustment of rates, the application of any merit rating surcharge plan, nor any similar adjustment or surcharge for any payments made to or on behalf of an insured for damages not attributable to any fault of the insured.

(6) Policies of motor vehicle insurance shall not provide for any adjustment of rates, the application of any merits surcharge rating plan, nor any similar adjustment or surcharge for the first violation of 23 V.S.A. § 800.

Vermont Statutes Annotated, Title 8, Section 4204.

§ 4204. Illegal provisions

Such policy shall not be so issued or delivered if it contains a provision contradictory, in whole or in part, to any of the provisions of sections 4201-4203 and 4205-4209 of this title; nor shall any endorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with such provisions. Such policy shall not be so issued or delivered if it contains any provision purporting to make any portion of the charter, articles of association, constitution or bylaws of the

insurer a part of the policy unless such portion of the charter, articles, constitution or bylaws shall be set forth in full in the policy.

Vermont Statutes Annotated, Title 8, Section 4205.

§ 4205. Effect of false statement in application

The falsity of a statement in the application for a policy covered by such provisions shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by insurer.

Vermont Statutes Annotated, Title 8, Section 4206.

§ 4206. Acts not constituting waivers

The acknowledgment by an insurer of the receipt of notice given under a policy covered by such provisions, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of a claim thereunder shall not operate as a waiver of any of the rights of the insurer in defense of a claim arising under such policy.

Vermont Statutes Annotated, Title 8, Section 4207.

§ 4207. Penalty for unauthorized alterations

An alteration of a written application for insurance by erasure, insertion or otherwise, shall not be made by a person other than the applicant without his written consent, and a person making such alteration without the

consent of the applicant shall be fined not more than $500.00. If such alteration is made by an officer of the insurer, or by an employee of the insurer with the insurer's knowledge or consent, such act shall be deemed to have been performed by the insurer thereafter issuing the policy upon such altered application.

Vermont Statutes Annotated, Title 8, Section 4208.

§ 4208. Construction of illegal policies

A policy issued in violation of such provisions shall be held valid, but shall be construed as provided in such provisions. When a provision in such policy is in conflict with such provisions, the rights, duties and obligations of the insurer, the policy holder and the beneficiary shall be governed by such provisions.

Vermont Statutes Annotated, Title 8, Section 4209.

§ 4209. Penalties

A company, corporation, association, society or other insurer or any officer or agent thereof that issues or delivers to a person, firm or corporation in this state a policy in wilful violation of such provisions shall be fined not more than $500.00 for each offense. The commissioner may revoke the license of a company, corporation, association, society or other insurer of another state or country, or of the agent thereof, that wilfully violates such provisions.

Vermont Statutes Annotated, Title 8, Section 4210.

§ 4210. Cost of examinations

The insurer under any motor vehicle liability insurance policy shall bear the cost of all physical examinations imposed on the insured or proposed insured as a condition for issuance or renewal of the policy.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GERRISH CORPORATION et. al. Woodstock East Woodstock, Vermont	)	
Plaintiff,	)	Docket No. 89-19
v.	)	(Filed January 17, 1989)
Universal Underwriters Insurance Company Kansas City, Missouri	)	
Defendant	)	

Complaint for Declaratory Judgment

Parties, Jurisdiction and Venue

1. This action is filed under the Federal Declaratory Judgment Act, 28 U.S.C. §2201. This court has jurisdiction over this action pursuant to 28 U.S.C. §1334(b).

2. Kurt D. Gerrish is a citizen of New Hampshire. Gerrish Corporation d/b/a Gerrish Motors and d/b/a Scrub-A-Dub is a Vermont Corporation with a principal place of business in Woodstock, Vermont.

3. Defendant Universal Underwriters Insurance Company has a principal place of business in Kansas City, Missouri.

The Pollution Controversy

4. Plaintiff Gerrish Corporation is the owner of a shopping center in Woodstock, Vermont, known as "Woodstock East". Woodstock East consists of approximately 4.8 acres, which since 1968 has been

developed and operated as a multi-use property, including approximately 15 retail stores and 8 apartments. From 1968 through 1988, Gerrish Corporation's business offices and various businesses, including Gerrish Motors which operated an automotive dealership (sales, leasing, and service) on behalf of its various franchises and Scrub-A-Dub, a car wash and retail petroleum sales facility, were also located at Woodstock East. Among other things, Scrub-A-Dub, a corporate division of Gerrish Corporation, sold petroleum products to business customers of Gerrish Motors.

5. During 1972, certain oil storage tanks were installed at Woodstock East as a part of the retail petroleum sales business conducted by Scrub-A-Dub. The tanks were installed by Woodstock Structures, Inc., and retail sales began during November of 1972.

6. During the next twelve months, Scrub-A-Dub sold in excess of 75,000 gallons of petroleum to its customers, and received periodic fuel deliveries to replenish its supplies.

7. During November 1973, Scrub-A-Dub through its employees discovered that a certain quantity of gasoline could not be accounted for, and concluded that a substantial quantity of the lost product had to be the result of a gasoline spill. The volume of gasoline loss was computed to be 4,785 gallons for the period December 1972 through November 1973, which loss could also have involved unauthorized or unrecorded taking or theft of a certain amount of such gasoline.

8. In the repairs which followed, the storage tanks were excavated and tested and determined not to be leaking. However, a certain pipe fitting or connector involving one tank and gasoline pump was determined to be cracked. This fitting was then thought

to be the probable source for the lost gasoline, and a new pipe fitting and tank were installed.

9. In a subsequent settlement, Gerrish Corporation received $2,086 for the value of the lost gasoline product. In return, Gerrish Corporation released Woodstock Structures, Inc., and Wyman's Inc., from damages it sustained on account of the gasoline loss.

10. On May 31, 1984 Gerrish Corporation entered into a lease and option to purchase agreement with Woodstock East Associates, a limited partnership. By this agreement, Gerrish Corporation leased its Woodstock East premises to Woodstock East Associates for a term of five years. Such agreement also contained an option to purchase, which option has not been exercised by the lessee. At all times material since May 31, 1984, Gerrish Corporation has continued to hold title in fee simple to such property.

11. On May 6, 1985, the State of Vermont through its Agency of Environmental Conservation ("the State") notified Gerrish Corporation that Woodstock East was the source of petroleum pollution which was entering a "natural drainage stream" which "empties directly" into the Ottauqechee River. Such "continued migation [sic]" was determined to be hazardous and in violation of State law, and the State gave notice pursuant to 10 V.S.A. section 1283 that appropriate action would be required "to determine the source, movement and extent of product leakage" ("the Pollution Claim"). Further, the State gave notice that it had the right to undertake the steps needed to determine the source of the pollution and efforts required to minimize and correct the pollution, but first had the obligation to "provide parties who may be potentially responsible for the threat to the environment with an opportunity to voluntarily perform the necessary corrective actions

under the direction of the Agency." It further advised that the State had the authority to expend State funds to undertake the necessary clean-up efforts and had the statutory authority, "pursuant to 10 V.S.A. 1283, to recover these costs from the responsible party". See Attachment A, copy of State's letter of May 2, 1985 to Kurt Gerrish.

12. Upon receipt of the State's letter, Gerrish Corporation notified Universal and undertook efforts through its employees and consultants to comply with the State's requests for monitoring and clean-up of the pollution. By letter of June 11, 1985 (Attachment B), Gerrish Corporation notified Universal and requested that such insurer be responsible for further costs involved in monitoring and cleaning up the source of the pollution. Gerrish Corporation further requested a response concerning whether coverage would be afforded under the terms of Universal's insurance policy, No. 428584D ("the Policy", copy attached as exhibit C).

13. Universal responded by agreeing to investigate the State's Pollution Claim, but did so under a certain non-waiver agreement (copy attached as Exhibit D-1). Universal, moreover, demanded that Gerrish Corporation report all further "contacts by the State" and "[u]nder no circumstances should you commit Gerrish Corporation to any admission or concession of any liability either for further testing or for any clean-up activities" (see Attachment D-2, copy of letter from Edward R. Kiel, Esq., to Philip M. Johnson, Esq., dated December 12, 1985).

14. Thereafter, Universal agreed to certain monitoring and passive clean-up efforts undertaken by Ground Water Technology, Inc. However, Universal has consistently maintained that it has no responsibility (1) to undertake, either on its own initiative or through

direct contact with the State or others, active clean-up of the source of the Pollution Claim or (2) to determine whether the Pollution Claim and its cost of clean-up are an injury which is insured under the Policy. Furthermore, it has refused to reimburse Gerrish Corporation for all expenses it has incurred to date as a consequence of the State's Pollution Claim. Such expenses, among other things, include legal services provided by Phillip M. Johnson, Esq. (see Attachment D-3, copy of letter of Phillip M. Johnson, Esq., to Ed Grogan of Universal, dated December 5, 1985).

15. In subsequent correspondence, Universal has advised (1) that it will not "indemnify any future owners of the property" (see Attachment D-4, letter of Gary L. Mayberry to Kurt Gerrish, dated September 15, 1986); (2) that it has not identified with "particularity" the source and cause of the pollution and (3) "cannot, at this time, provide you with any guarantee regarding our future commitment to all claims relating to this loss" (see Attachment D-5, letter of Gary L. Mayberry to Gerrish Motors, dated July 20, 1987);

16. In subsequent correspondence, Universal through its attorney advised "I am authorized to state that if upon conclusion of the investigation into the causes and origins of the current pollution problem at Gerrish Corporation it is determined that Gerrish Corporation or any other named insured caused the pollution during the policy period and that:

    (1) it was sudden and accidental and does not involve pollution of any waterway (Unicover Coverage Part 500 Garage Insurance; Exclusions (m) and (n)) or

(2) occurred in connection with an auto used in garage operations (Vermont State Amendatory Part);

then Universal Underwriters will cover the loss subject to the limits of the policy" (Attachment D-6, letter of Edward R. Kiel, Esq., to Philip M. Johnson, Esq., dated October 30, 1987).

For reasons discussed below (see Paragraphs 21-31), Plaintiffs disagree with Universal's position and believe that the Policy should afford coverage.

17. Thereafter, Universal through its attorney advised in a matter related to the 1972-1973 gasoline discharge "[w]e understand these losses occurred in 1972 and 1973. At that time Universal Underwriters was not the carrier which insured Gerrish. The acts complained of therefore do not fall within the policy period as defined by the insurance contract" (see Attachment D-7, letter of Edward R. Kiel, Esq., to Thomas P. Wright, Esq., dated November 11, 1988).

18. Such communications by Universal to Gerrish Corporation (see paragraphs 13-17) constitute an anticipatory breach of the Policy by Universal since, read together, they indicate an intent by Universal (1) not to pay the costs required to actively clean-up, as opposed to monitor, the pollution which has produced the State's Pollution Claim and (2) to deny, if and when the issue is raised, that the Policy issued by Universal for the year 1984-1985 provides coverage to the Pollution Claim which, although asserted in 1985, probably arose out of the 1972-1973 gasoline spill (see paragraphs 5-8).

The Insurance Coverage Provided by the Policy:

19. At Plaintiffs' request, Universal agreed to provide Plaintiffs with certain insurance coverage, and

issued Plaintiffs a certain insurance policy ("the Policy"), which was in effect for the period from September 1, 1984 to September 1, 1985.

20. Among other things, the Policy provided liability insurance coverage for Plaintiffs' Woodstock East premises. Further, the Policy provided coverage to Plaintiffs for various types of perils, including "GARAGE OPERATIONS AND AUTO HAZARD (Part 500)", "GENERAL LIABILITY INSURANCE (Part 950") and Umbrella coverage (Part 980), (collectively referred to hereafter as the "Insured Perils").

21. Such coverage of the Insured Perils was subject to the requirements of Chapter 113, Vt. Stat., particularly section 4201, which required Universal to file and obtain prior approval of its specimen policies, including exclusions, by the Department of Banking and Insurance ("the Department"), and section 4202, which required Universal to comply with certain disclosure standards for the form and contents of its policies, which included the obligation to print the exclusions of the policy "with the same prominence as the benefits to which they apply".

22. Upon information and belief, at all times between January 1973 and July 1, 1984, the Department required all insurers writing insurance policies for Vermont residents including businesses to provide coverage for pollution losses or damages incurred by or asserted against Vermont insureds. During such period, certain insurers provided specific endorsements to their Vermont policies, either similar or identical to endorsements prepared by the Insurance Services Office (see Attachment E), which specifically stated that "contamination or pollution" coverage would not be excluded from coverage sold by such insurers to Vermont residents.

23. Not withstanding the language of Vt. Stat. Tit. 8 section 4201 and the Department's specific requirement, in effect for the years 1973 through 1984, that pollution coverage would be specifically provided all Vermont residents, Universal undertook to eliminate such coverage from portions of the Policy issued to Plaintiffs.

24. In its Garage Operations or Auto Hazard coverage (see Part 500, at 22-26 of Attachment C), Universal undertook "to pay all sums the INSURED must pay as damages (including punitive damages where insurable by law) because of INJURY to which this insurance applies caused by an OCCURRENCE arising out of GARAGE OPERATIONS OR AUTO HAZARD". Such coverage was limited by numerous exclusions, including (m) and (n);

    "(m) INJURY caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental";

    "(n) INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course, regardless of the nature of the discharge, release, or escape (whether accidental or not)";

25. Such exclusions notwithstanding, the State's Pollution Claim constitutes an injury to Plaintiffs covered under Universal's Garage Operations coverage (see the Policy, at 22), which insures claims arising out of "the ownership, maintenance or use of that portion of any premises where YOU conduct YOUR AUTO business and all other operations necessary or incidental thereto." This coverage includes the retail petroleum sales operation which was, among other

things, utilized by Plaintiffs to sell or supply gasoline or diesel fuel to the business customers of Gerrish Motors. See paragraph 4.

26. When the Policy was issued, and at all times material, it was the intent of the Department not to approve any pollution exclusions such as appear above in Paragraph 25. Such exclusions, therefore, are unlawful and of no force and effect pursuant to Vt. Stat. Tit. 8, sections 4201 and 4204.

27. In its Policy, Universal set forth certain language which addressed its pollution and contamination exclusions which would be applicable to Vermont insureds. In its exclusions (m) and (n), Universal deleted such exclusions "with respect to any AUTO insured by this policy and licensed or principally garaged in, or used for GARAGE OPERATIONS in Vermont" (see Attachment C, "Vermont State Amendatory Part". Such language concerning these exclusions is void and unenforceable in Vermont because (1) it purports to eliminate pollution coverage for certain garage operations, and thus is contrary to the express policy of the Department; (2) has not received express approval by the Department in accordance with Vt. Stat. Tit. 8, section 4201 and (3) even if the purported exclusions of pollution coverage are otherwise enforceable, then they are nevertheless void as contrary to the disclosure requirements of section 4202. See Attachment C, Declaration Page 1-C.

28. In its General Liability Insurance (Part 950), Universal undertook to insure various specified hazards including "PREMISES", "MANUFACTURERS AND CONTRACTORS", "Code 55411" and "RETAIL GAS SALES". In the insuring agreement for Part 950 coverage, Universal undertook to "pay all sums the INSURED legally must pay as damages (including

punitive damages where insurable by law) because of INJURY to which this Coverage Part applies, caused by an OCCURRENCE arising out of" the insured hazards. See Attachment C, at 31, and Declaration Page, at 1-D.

29. The State's Pollution Claim constitutes an injury to Plaintiff covered under Universal's General Liability Coverage (see the Policy, at 31-33), as either (1) an injury to "PREMISES" (arising out of the "ownership, maintenance or use of the premises . . . and all operations necessary on incidental thereto", Attachment C, at 31) or (2) an injury caused by "CONTRACTORS" (arising out of "Construction operations for YOU by any contractor at the premises . . . including YOUR acts or omissions in the general supervision of these operations" (*id.*, at 31). See also the Declarations Page (Attachment C, at 1-D) which covers "RETAIL GAS SALES", a term undefined in the Policy, which by its ordinary meaning encompasses the gasoline spill which occurred and resulting pollution which was discovered as stated earlier in Paragraph 7.

30. Universal provided two exceptions to Coverage under Part 950:

> "(e) INJURY caused by the dumping, discharge, or escape of irritants, pollutants, or contaminants. This exclusion does not apply if the discharge is sudden and accidental";
>
> "(f) INJURY caused by the discharge, release, or escape of any petroleum substance into or upon any body of water or water course, regardless of the nature of the discharge, release or escape (whether accidental or not)";

These two exclusions are unenforceable in Vermont because (1) they purport to eliminate pollution coverage under the general liability coverage, and thus are contrary to the express policy of the Department; (2) have not received express approval by the Department in accordance with Vt. Stat. Tit. 8 Section 4201; (3) are void as contrary to the disclosure requirements of section 4202, since the coverage provided ("RETAIL GAS SALES", see Declaration Page, *id.*, at 1-D) makes no reference to the purported pollution exclusions in violation of Vt. Stat. Tit. 8 sections 4202(2) and 4204 and (4) are automatically changed by the policy to conform to the law of Vermont, which includes the requirement of mandatory pollution coverage then required by the Department. See Attachment C at 7, "CONFORMING TO LAW" section.

31. In its Umbrella coverage (Parts 970 and 980, at 34-41 of Attachment C), Universal undertook to provide excess liability coverage to Plaintiffs for insured losses which are in excess of the coverage provided by the Policy (See Attachment C, Declaration Page, at 1-E). The limits of liability coverage for GARAGE OPERATIONS AND AUTO HAZARD (Part 500) and GENERAL LIABILITY INSURANCE (Part 950) are $300,000 per injury. The umbrella coverage provided by Part 980 is $3,000,000, after payment of a $10,000 retention by Plaintiffs.

Requests for Relief

Plaintiffs respectfully request that the court order and adjudge as follows:

1. that the State's Pollution Claim, discovered and asserted by the State during 1985, is an INJURY which had its OCCURRENCE during the coverage

period provided by the Policy; See the Policy, at 22 and 27;

2. that Universal has the obligation to defend and indemnify Plaintiffs with respect to the State's Pollution Claim;

3. that Universal's obligation to provide coverage with respect to the State's Pollution claim arises out of (1) GARAGE OPERATIONS (Part 500) and/or (2) GENERAL LIABILITY (Part 980) coverage, and that umbrella coverage (Part 980) is also provided in accordance with the limits of coverage as set forth in the Policy's Declaration Pages;

4. that Universal's written denials of coverage (see Paragraphs 14-18) constitute an anticipatory breach of contract, which abrogates Plaintiffs' duty to cooperate with Universal, at least with respect to its efforts to seek a declaration of its rights and obligations arising out of the Policy and with respect to the Pollution Claim;

5. that to the extent Universal has not paid and thus indemnified Plaintiffs for expenses actually incurred by them, that Universal has breached its contractual duties owed Plaintiffs pursuant to the Policy (see Attachment C, at 22 and 31; and

6. that Universal is responsible for Plaintiffs' attorneys' fees and related expenses related to and produced by this Declaratory Judgment Action.

Dated this 13th day, of January 1989, in Burlington, VT.

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